88-647

FILED
OCT 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 88-8018

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

IN RE:
JACK R. WHITEHORN AND
MARY RUTH WHITEHORN,
DEBTORS,

JACK R. WHITEHORN AND
MARY RUTH WHITEHORN,
PETITIONERS,

V.

MARGARET H. MURPHY AND LAW FIRM:
SMITH, GAMBRELL & RUSSELL,
DEFENDANTS (APPELLEES).

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES
PURSUANT TO TITLE 28 U.S.C. § 1254**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a bankruptcy court in one judicial district can disturb or remove property of a debtor-in-possession, held by a third party, under the protection of a bankruptcy court in another judicial district without lifting of automatic stay on said estate property by the bankruptcy court of commencement?

2. Whether the United States Bankruptcy Court, Northern District of Georgia, Newnan Division, attempted to issue order to sell, cancel or trade this Petitioners/Debtors' estate property under the exclusive jurisdiction of the United States Bankruptcy Court, District of Nevada?

3. Whether the petitioners have been denied their civil liberties, due process of law, and have been a victim of obstruction of justice?

4. Whether the lower courts' opinion of jurisdiction is in conflict with this Honorable Court's precedent?

5. Whether the lower courts' opinion is in direct conflict with precedent of this Honorable Court's rulings related to property of the estate?

6. Whether the lower courts' opinion is in direct conflict with precedent of this Honorable Court's rulings with reference to Debtor's adequate protection and protection of property interest derived from the Fifth amendment?

7. Whether the lower courts are in direct conflict with this Honorable Court's Bankruptcy Rules 7001, 7070 and 4001?

8. Whether the lower court erred as a matter of equity and law regarding the doctrine of res judicata?

9. Whether the ruling Court of Appeals for the Eleventh Circuit rendered their decision in conflict with other federal circuit courts of appeals?

10. Whether the lower courts' opinion is in direct conflict with this Honorable Court's precedent with reference to due process and equal protection?

PARTIES OF INTEREST TO THE PROCEEDING

Persons interested in the outcome of this proceeding are:

1. Judge of court of commencement of Petitioners/Debtors Jack R. Whitehorn and Mary Ruth Whitehorn's Chapter 11 proceeding: United States Bankruptcy Court Judge for District of Nevada, Robert Clive Jones.
2. Jack R. and Mary Ruth Whitehorn, Petitioners/Debtors and numerous creditors of the estate.
3. Judge issuing original order: United States Bankrutpcy Judge W. Homer Drake, Jr.
4. Reviewing Judge: United States District Judge G. Ernest Tidwell.
5. Reviewing Justices of the United States Court of Appeals for the Eleventh Circuit: Judges Hill, Fay and Kravitch.

6. Counsel to Appellees, Margaret H. Murphy and Smith, Gambrell & Russell Law Firm: P. Stephen Kratsch and Edward C. Brewer, III, Smith, Gambrell and Russell, Atlanta, Georgia.

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LOWER COURTS' OPINION REFERENCE AND JURISDICTION

This is a petition for issue of a writ of certiorari from a final judgment by the United States Court of Appeals for the Eleventh Circuit (date of entry of final judgment, July 22, 1988). Jurisdiction of the instant said petition is lodged in this Honorable Court pursuant to Title 28, U.S.C. § 1254.

Complaint was filed April 3, 1986 by Petitioners/Debtors and answered by Appellees. (Appendix 1) On motion of Appellees for change of venue, motion was granted and moved to the Northern District of Georgia, Newnan Division by order of the United States Bankruptcy Court, District of Nevada; order entered December 17, 1986. (Appendices 7 and 8)

Summary judgment motions were filed by Appellees and Petitioners/Debtors respectively. The United States

Bankruptcy Court, Northern District of Georgia, Newnan Division entered a judgment/order July 31, 1987. (Appendix 6)

On appeal to the United States District Court, Northern District of Georgia, Newnan Division by Petitioners/ Debtors, an order was entered on December 23, 1987 by said court. (Appendix 5)

On appeal to the United States Court of Appeals for the Eleventh Circuit, an order was entered on May 26, 1988 by said court. (Appendix 4)

On Petitioners/Debtors' suggestion for rehearing in banc, the appeals court denied the rehearing by order entered July 22, 1988. (Appendix 3)

A motion for stay of mandate pending application for writ of certiorari was filed August 1, 1988. The motion was granted by order entered August 16, 1988. (Appendix 2)

STATUTES INVOLVED

Bankruptcy is a federal field, unquestionably, the United States Constitution is paramount. Due process, equal protection and other constitutional guarantees must be accorded. Any trial, wherein the appearance of justice is lacking, is barred by the Fifth Amendment as lacking in due process.

Basis for the Bankruptcy Law is Article 1, Section 8 of the United States Constitution.

The grant of jurisdiction in bankruptcy matters in both 1978 legislation and the 1984 modifications is contained in a single section of Title 28. What was Section 1471 under the former has become Section 1334 of the latter.

Title 28 § 1334(d) sets out:

> "The district court in which a case under Title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located,

> of the debtor as of the commencement of such case, and of property of the estate."

Title 28 § 1471(e) sets out:

> "The bankruptcy court in which a case under Title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case."

A bankruptcy court of a different jurisdiction cannot lift the automatic stay activated through a different district pursuant to Title 28 § 1481. Said statute sets out:

> "A bankruptcy court shall have the powers of a court of equity, law and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment or imprisonment."

Title 28 § 157(e) provides for a core proceeding as is the proceeding at bar, "orders to turn over property to the estate."

Title 11 § 362 protects a debtor's property wherever located. The automatic

stay is not an act of a court but an act of Congress. Said statute sets out:

> "(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 U.S.C. 78 eee(a)(3)], operate as a stay applicable to all entities of --
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> >
> > (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
> >
> > (3) any act to obtain possession of the estate or of property from the estate or to exercise control over property of the estate --

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce any lien against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3), does not operate as a stay --

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection 9(a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of

the enforcement of a judgment, other than a money judgment, obtained, in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of commodity contracts, forward contracts, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward

contracts, or security contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations or property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; or

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.)

(including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law; or

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act,

1936 (46 App. U.S.C. 1117 and 1271 et seq. respectively).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsection (d), (e) and (f) of this section.

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate.

(2) The stay of any other act under subsection (a) of this section continues until the earliest of --

(A) The time the case is closed;

(B) The time the case is dismissed; or

(C) If the case is a case under Chapter 7 of this title concerning an individual or a case under Chapter 9, 11, 12 or 13 of this title, the time a discharge is granted or denied."

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay --

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if --

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection

(d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section --

(1) the party requesting such relief has the

> burden of proof on the issue of the debtor's equity in property; and
>
> (2) the party opposing such relief has the burden of proof on all other issues.
>
> (h) an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Title 11 § 361 provides for adequate protection. Said statute sets out:

> "When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by--
>
> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

Title 11 § 1108 sets out the authorization to operate business.

"Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business."

Title 11 § 363 use, sale or lease of property; allows the debtor to use, sale of estate property of reorganization of estate. Section 363(c)(1) sets out:

"If the business of the debtor is authorized to be operated under section 721, 1108,

1304, 1203 or 1204 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

Title 11 § 551 provides for automatic preservation of avoided transfer. The statute states:

> "Any transfer avoided under section 522, 544, 545, 547, 548, 549 or 724(a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate but only with respect to property of the estate."

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JACK R. WHITEHORN AND
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Petitioners,

V.

MARGARET H. MURPHY AND LAW FIRM:
SMITH, GAMBRELL & RUSSELL,
Defendants (Appellees).

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES PURSUANT TO TITLE 28 U.S.C. ¡ 1254

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Jack R. Whitehorn and Mary Ruth Whitehorn, debtors and petitioners, herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled case on July 22, 1988; (date of entry of judgment on petition

for rehearing and suggestion of rehearing in banc).

STATEMENT OF THE CASE

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254.

Jack R. Whitehorn and Mary Ruth Whitehorn, Petitioners, filed a Voluntary Debtors' Petition in the United States Bankruptcy Court District of Nevada on October 6, 1980. Debtors were qualified and entitled to the benefits of Title 11, United States Code as Voluntary Debtors. Relief was ordered by said Court on October 6, 1980. (See Appendix 8.) All property, wherever located, of Jack R. Whitehorn and Mary Ruth Whitehorn was immediately protected by the automatic stay provided by 11 U.S.C § 362 and was under the exclusive jurisdiction of the United States Bankruptcy Court, District of Nevada.

On the first day of December 1969, a

meeting of the incorporator and director of WFDR, Inc. was held. Jack Whitehorn acquired all of the WFDR, Inc. outstanding stock, 5,050 shares, issued and titled in the name of Jack Whitehorn -- Certificate No. 1 for 50 shares and Certificate No. 2 for 5000 shares. The by-laws were adopted and election of director was held. Jack Whitehorn was elected sole director.

On December 2, 1969, the sole director, Jack Whitehorn, met and elected Jack Whitehorn, President and Treasurer and Mary Whitehorn, Secretary. The President-Treasurer Jack Whitehorn was authorized to borrow funds for the corporation, pledge the assets of the corporation to secure loans as in the judgment of the President shall be for the best interest of the corporation.

Jack Whitehorn talked with Mr. John Neely, Sr., an officer of Citizens State

Bank, on behalf of the corporation's negotiating certain loans from the Citizen State Bank in Butler, Georgia as already had been agreed to and set aside by the bank, pursuant to a letter of credit. As president of WFDR, Inc., Jack Whitehorn pledged the assets of the corporation as collateral for said loan. The initial loan was completed in January 1970.

In addition to corporate assets, Jack Whitehorn pledged the entire outstanding said stock of WFDR, Inc., 5,050 shares, titled to Jack Whitehorn as well as personally guaranteeing the corporate note with Jack Whitehorn's entire personal estate.

The stock was held by the bank over the years as notes were renewed, extended and/or refinanced.

Jack Whitehorn never had a personal note in the Citizens State Bank of

Butler, Georgia.

The last corporate note was made on the 23rd day of July 1979. Jack Whitehorn's WFDR, Inc. stock, the total outstanding stock issued, 5,050 shares was pledged and continued to be held by the bank in addition to corporate assets as collateral. The Citizens State Bank had no power of attorney to transfer or sell the stock.

On March 28, 1980, Jack Whitehorn signed some papers that Debtor thought was a Trust Agreement. Jack Whitehorn was sick, only out of the hospital a few days. The signed document turned out to be a Stock Option Agreement on all of Jack Whitehorn's WFDR, Inc. stock, the entire issued and outstanding stock of the corporation. The said Stock Option Agreement sets out that the Citizens State Bank is the pledgee of the 100 percent outstanding capital stock of

WFDR, Inc.

After discussion with the alleged buyer, John F. Whitehorn, and his agent, Robert Garstin, on May 8, 1980, Petitioner/Debtor, Jack Whitehorn, asserted full authority over the corporation and its holdings as president, sole director and 100 percent stockholder by mailgrams.

On May 9, 1980, without Jack Whitehorn's knowledge or approval of any corporate resolution, WFDR, Inc. filed for Chapter 11 protection under the United States Bankruptcy Code in the United States Bankruptcy Court, Northern District of Georgia, Newnan Division. The only reason for the voluntary petition was the automatic stay of the United Bankruptcy Code to keep Jack Whitehorn away from the property owned by Jack Whitehorn's stock.

The Appellees acted as attorneys for

the Debtor-in-Possession corporation, as well as, estate administrator. The said Attorneys/Appellees did in fact act with conflict of interest as set out in pleadings in lower courts.

Jack Whitehorn's attorneys filed, on his behalf, an adversary proceeding inter alia to recover 100 percent of stock titled to Jack Whitehorn in the WFDR, Inc. Bankruptcy Case 80-00136N in the United States Bankruptcy Court for the Northern District of Georgia, Newnan Division. The complaint in the adversary proceeding was Case No. 80-0034N, filed July 24, 1980. The court subsequently abstained from hearing said proceeding. (No basis for applying the doctrine of res judicata as discussed herein.)

On October 6, 1980, Jack Whitehorn and Mary Ruth Whitehorn filed a personal Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the

District of Nevada. The automatic stay is now active pursuant to 11 U.S.C § 362. The said stock on the active day of the automatic stay was titled to Jack Whitehorn, Debtor named herein, and was being held by the Citizens State Bank, Butler, Georgia. No plan of reorganization by WFDR, Inc. had been offered and/or filed with the United States Bankruptcy Court, Northern District of Georgia, Newnan Division on October 6, 1980, date of automatic stay on all property of Debtor wherever located and under exclusive jurisdiction of the Bankruptcy Court, District of Nevada.

On December 8, 1980, a preference action against John F. Whitehorn for the purpose of recovering the WFDR, Inc. stock was filed in the United States Bankruptcy Court, District of Nevada.

Upon motion by John F. Whitehorn and

after hearing, the Nevada bankruptcy court subsequently transferred said preference proceeding to the United States Bankruptcy Court, Northern District of Georgia, Newnan Division which had jurisdiction over the WFDR, Inc. bankruptcy proceeding. The Honorable Judge Lloyd D. George signed an order, January 30, 1981, retaining Jack Whitehorn and Mary Ruth Whitehorn's bankruptcy case BK-LV-80-936 and transferring only the adversary proceeding No. 800197 filed in BK-LV-80-936.

On this same date, January 30, 1981, WFDR, Inc., the Debtor-in-Possession, in that instant case, filed an application to sell its assets, not Jack Whitehorn's stock.

On February 11, 1981, Jack Whitehorn filed an objection to the sale of the assets of WFDR, Inc. All parties in

interest were advised of the Chapter 11 proceeding pending in the United States Bankruptcy Court, District of Nevada. Jack Whitehorn's assets were now under the protection of the United States Bankruptcy Court, District of Nevada, including all outstanding and issued WFDR, Inc. stock titled in Jack Whitehorn's name.

On March 16, 1981, Bankruptcy Judge W. H. Drake, Jr. ordered the property of WFDR, Inc. could be sold. In a second March 16, 1981 order, Bankruptcy Judge W. H. Drake, Jr. overruled Jack Whitehorn's objection after a hearing on whether or not to approve the sale of the assets, not Jack Whitehorn's stock.

On March 26, 1981, Jack Whitehorn filed a motion for a new trial, for alteration or amendment of judgment or additional findings of facts. Bankruptcy Judge W. H. Drake, Jr. denied the motion

by order, April 8, 1981.

Jack Whitehorn then appealed the said orders of March 16, 1981 and April 8, 1981 to the United States District Court for the Northern District of Georgia, Newnan Division.

On September 18, 1981, the Honorable G. Ernest Tidwell issued an order, denied the appeal, writing the sale of the assets is moot since an amended plan providing for the sale of stock in lieu of sale of the assets was approved and consumated. The Judge wrote the sale of the stock was not appealed and no stay of the sale was obtained by Jack Whitehorn. The issue of the sale of stock is not properly before the court. (Again no basis for res judicata as discussed herein.) Further, WFDR, Inc. and Provident filed a motion with said court requesting the appeal to be dismissed as moot. The said order was granting motion

of Appellees. Orders which are not final, or which are made on incidental or collateral to the determination of the main controversy are not generally conclusive or res judicata; Roland v. Barge, 134 S.E. 2d 463, 108 Ga. App. 689.

Petitioners/Debtors felt no appeal or stay was necessary since an automatic stay through the United States Bankruptcy Court, District of Nevada, mandated by Congress, was in full effect and protecting all the assets, including, but not limited to, the 5,050 shares, 100 percent issued and outstanding WFDR, Inc. stock, titled in Jack Whitehorn's name. However, Jack Whitehorn carried the appeal of the sale of the assets to the Eleventh Circuit Court of Appeals.

The United States Court of Appeals for the Eleventh Circuit simply affirmed the district court findings. This order was issued August 17, 1983.

The appealed March 16, 1981 order issued by Bankruptcy Judge W. H. Drake, Jr. states the parties may restructure the transaction as a stock acquisition or merger. The Judge did not order any transactions that would violate state law or that would interfere with the automatic stay issued through the United States Bankruptcy Court District of Nevada with jurisdiction over Jack Whitehorn's 100 percent issued and outstanding WFDR, Inc. stock, held by the Citizens State Bank of Butler, Georgia as collateral on a corporate loan.

On May 27, 1981, WFDR, Inc. filed a disclosure statement and an amended plan of reorganization with the Georgia Bankruptcy Court. Jack Whitehorn objected to the disclosure statement but was overruled by order, June 17, 1981. Jack Whitehorn objected to the Amended Plan of Reorganization, especially the

Section doing away, selling or cancelling Jack Whitehorn estate's stock. The said disclosure statement and amended plan was executed by Robert M. Garstin, again asserting that he is President of WFDR, Inc. Jack Whitehorn was again overruled by Bankruptcy Judge W. H. Drake, Jr. by Order, June 29, 1981. Jack Whitehorn did not appeal this order. Debtor felt no appeal was needed. Said stock was already stayed as of October 6, 1980, by the United States Bankruptcy Court, District of Nevada under § 362 of the Bankruptcy Code which automatically enjoins and stays all persons and entities from taking any action pertaining to said estate unless a proceeding to lift stay be filed before the court of jurisdiction, the United States Bankruptcy Court, District of Nevada. No said proceeding was or has ever been filed. (See Appendix 8.)

During the month of August 1981, Debtor heard of some type of stock closing concerning Jack Whitehorn's WFDR, Inc. stock. Debtor again checked the United States Bankruptcy Court, District of Nevada Clerk file to be sure that nothing had been filed concerning the lifting of automatic stay on said stock. There was not, nor is there now, any document pertaining to selling, cancelling or doing anything with said stock. Debtor or the bankruptcy court of jurisdiction was not, and has never been, notified by any party involved in the alleged stock deal of the time, date or place for removing said stock from the Citizens State Bank where Jack Whitehorn left said stock pledged as collateral on a corporate loan. Debtor called legal counsel and asked if he had heard of any transaction concerning said stock. He said he had not but would check on it.

He called back and advised that he understood some type of stock deal had taken place. Debtor asked him to write to whomever he thought would be proper, putting the alleged purchaser of Jack Whitehorn's stock on notice that any purchase of said stock or any stock transaction of WFDR, Inc. was without Debtor's approval and without the approval of the court who had jurisdiction over said stock. He did write a letter to Mr. Bird, Attorney for Provident Broadcasting Company, setting out objection and advising the transaction would be null and void.

The Adversary Case 80-0197, transferred from the United States Bankruptcy Court, District of Nevada to the United States Bankruptcy Court, Northern District of Georgia, Newnan Division, becoming Adversary Case No. 81-0039N was tried before Bankruptcy

Judge W. Homer Drake on December 16, 1981 and continued on January 27, 1982. The court found the transfer of the March 28, 1980 Stock Option Agreement, a voidable preference, the order signed August 12, 1982, entered August 18, 1982.

John F. Whitehorn, timely filed a notice of appeal within ten days of the filing of the order of August 18, 1982.

The Honorable Judge G. Ernest Tidwell of the United States District Court for the Northern District of Georgia, Newnan Division signed an order on the 25th day of May 1983, entered on the 27th day of May 1983. The court granted the appeal and wrote in part, "Whether or not the Stock Option Agreement is a voidable preference is an issue clearly separable from the main actions, since the two related main actions involve the reorganization of a radio station holding company and two individuals. The instant

action involves the stock of the radio station holding company in general, and the questions of ownership of that stock in particular. Although the question of stock ownership is related to the two pending reorganization actions, the issue of 'who owns the stock' is separable because the pending reorganizations are taking place and will continue to take place while the disputed stock is physically held by a bank in Butler, Georgia awaiting dispositions of the ownership issues." (At this time, Petitioners' stock had already been moved, sold, cancelled or traded.) The court wrote, the court also concludes that the issues raised in this appeal are too important to be denied appellate review at this time because the issue of stock ownership must be determined before the radio holding company is able to operate independently of the bankruptcy

court. The court wrote, the date of the Stock Option Agreement to be avoided was March 28, 1980. The court vacated the judgment and remanded the action to the bankruptcy court for compliance with Bankruptcy Rule 752 as to the issues raised in Appellees' § 547 claims of a voidable preference.

Bankruptcy Judge W. Homer Drake did not respond to the Honorable District Court order.

On July 14, 1983, Margaret H. Murphy, Estate Administrator and Attorney for the Estate Administrator, along with the Committee of Unsecured Creditors filed an application to settle claims. The Petitioners/Debtors objected to the application on many grounds as set forth in the objections filed with the Georgia bankruptcy court.

On January 25, 1983, one order was signed by Bankruptcy Judge Drake and on

January 25, 1984, another order was signed by Judge Drake, both orders were entered on January 26, 1984. The order signed by Judge Drake, January 25, 1983, was captioned "Order Granting Applications to Settle Claims." The order signed on January 25, 1984, was captioned "Order." In the January 25, 1984 order, on the final page (page 13), the court sets out in the next to last paragraph that the preference action successfully brought by Mr. Jack Whitehorn against Dr. John Whitehorn regarding the pre-petition transfer of stock has been remanded to this court for additional findings of fact. However, the preference action has become moot (not settled by judicial decision, therefore no basis for res judicata) under the terms of the settlement by which Dr. John Whitehorn disavows any interest in the equity of the Debtor. This order leaves no

questions pertaining to time frame, pre-petition or ab-initio.

Over the years, after filing for protection under Chapter 11 of the United States Bankruptcy Code, October 6, 1980, Petitioners/Debtors have received on two or three different occasions, a white sheet of paper with Certificate of Interest typed and underlined. The paper has not been signed by anyone. Debtor thinks it is supposed to represent said stock in WFDR, Inc. It states it is issued in lieu of Jack Whitehorn's shares which were cancelled upon confirmation of the amended plan of reorganization of WFDR, Inc. in the United States Bankruptcy Court, Northern District of Georgia, Newnan Division. It further states that the holder shall have an interest in the proceeds of the sale of stock of WFDR, Inc. as set out in the plan and as determined by order of the

court. This alleged stock certificate is worthless, has no authority and is evidence of contempt of the United States Bankruptcy Court, District of Nevada, by the person(s) or entity preparing and transmitting same said documents. Only the Honorable United States Bankruptcy Court, District of Nevada has jurisdiction over Debtors' estate (stock included) by automatic stay issued October 6, 1980 and Judge Lloyd D. George's orders signed January 30, 1981, entered February 2, 1981, transferring the adversary proceeding, only, and retaining jurisdiction of Debtor Case BK-LV-80-936. The amended plan of WFDR, Inc. referred to, is executed by Robert M. Garstin who has no authority to sign any document on behalf of WFDR, Inc. due to Jack Whitehorn's being the rightful owner of all WFDR, Inc. corporate stock as ruled by Bankruptcy Judge W. Homer

Drake in the final order entered January 26, 1984.

A written request was made to Appellees for property of Debtor after Judge Drake's order entered January 26, 1984. Said communications requested written response.

On November 12, 1984, written response was received from Appellees denying Petitioners/Debtors' property that was granted pursuant to Judge Drake's final January 26, 1984 order.

The stock is property which Petitioners/Debtors may use, sell or lease under 11 U.S.C. § 363. The only reasonable, feasible method to salvage any possible return for Debtor's creditors is to proceed with the plan of reorganization as set out in the disclosure statement filed October 2, 1985, in the United States Bankruptcy Court for the District of Nevada.

Debtors are most concerned about the best interest of the estate, but foremost is the protection of said creditors.

The ownership of the WFDR, Inc. stock as outlined in the original petition seeking protection under the Bankruptcy Code Chapter 11 proceeding and instant relief ordered by the United States Bankruptcy Court, District of Nevada on October 6, 1980 has been litigated for over seven years.

On October 2, 1985, a disclosure statement and plan of reorganization ("plan") was filed with the Petitioners/ Debtors' "Home" bankruptcy court (the commencement court of Petitioners/ Debtors' Chapter 11 proceeding), the United States Bankruptcy Court, District of Nevada. The said plan inter alia utilized the property ("stock") held by Petitioner/Debtor, Jack Whitehorn, free and clear of all liens pursuant to the

above actions stated herein to reorganize the debtor pursuant to Title 11, Chapter 11, United States Code.

An objection was filed by Dr. John F. Whitehorn of Dallas, Texas and more important, an objection was filed on or about December 16, 1985 by Defendant Margaret H. Murphy and Smith, Gambrell & Russell law firm.

A hearing was held before the court on December 17, 1985 and continued on February 27, 1986, wherein the court heard the evidence pertaining to the disclosure statement and plan.

On February 26, 1986, an order which did not approve Debtors' disclosure statement was entered by the court.

The court, from the bench in the December 17, 1985 hearing, set out that Debtors may have to file a turnover proceeding before Debtors could go forward with the plan.

On March 10, 1986, Debtors filed their intention to file a turnover of property adversary proceeding.

On April 3, 1986, the "Complaint to Compel Turnover of Property" was filed. (See Appendix 1.)

Appellees brought a motion for change of venue to the United States Bankruptcy Court, Northern District of Georgia, Newnan Division. This motion was heard on June 24, 1986. (See Appendix 7.)

On December 17, 1986, an amended order was entered, granting the Defendants' motion for change of venue, as well as, setting out that the court "is not presently lifting the stay with respect to any of Mr. Whitehorn's assets." (See Appendix 8.)

Summary judgment motions were filed by the Appellees and Petitioners/Debtors, respectively, in the United States

Bankruptcy Court, Northern District of Georgia, Newnan Divison.

The said court entered a judgment/ order on July 31, 1987. (See Appendix 6.)

Said order was appealed to the United States District Court for the Northern District of Georgia, Newnan Division and on December 23, 1987, the district court entered an order affirming the bankruptcy court's order. (See Appendix 5.)

The district court's order was timely appealed by Petitioners/Debtors to the United States Court of Appeals for the Eleventh Circuit on May 26, 1988. The United States Court of Appeals entered and order affirming the order of the district court. (See Appendix 4.)

On June 13, 1988, a suggestion for rehearing in banc was filed by Petitioners/Debtors. The petition for

rehearing was denied by order of the United States Court of Appeals for the Eleventh Circuit, entered July 22, 1988. (See Appendix 3.) A motion for stay of mandate pending application for certiorari was entered on August 1, 1988. The said motion was stayed by order entered August 16, 1988 to and including September 20, 1988. (See Appendix 2.)

REASONS FOR GRANTING WRIT

ARGUMENTS AND AUTHORITIES

The United States Court of Appeals for the Eleventh Circuit has affirmed a district court order and decided a federal question in a way in conflict with applicable decisions of this Honorable Court, decisions of other courts of appeals and federal statutes of the United States of America.

Title 11 § 551 automatic preservation of avoided transfers, as is this case, must withstand any attempted

circumvention.

First and foremost, the grant of jurisdiction in bankruptcy matters in both 1978 legislation and the 1984 modifications is contained in a single section of Title 28. What was Section 1471 under the former has become Section 1334 of the latter.

The commencement bankruptcy court is given personam jurisdiction, as well as in rem jurisdiction, to handle everything that arises in bankruptcy cases.

The Marathon case forced the bar and the bench to focus on the detailed meaning set out hereinabove; Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982) judgment stayed 459 U.S. 813, 103 S. Ct. 199, 74 L. Ed. 2d 160 (1982). The lower courts' opinions are in direct conflict with the decision set out hereinabove.

The WFDR, Inc. reorganization proceeding was commenced on May 9, 1980 in the United States Bankruptcy Court for Northern District of Georgia, Newnan Division. On October 6, 1980, Petitioners/Debtors commenced their reorganization in the United States Bankruptcy Court, District of Nevada. Petitioners' case is still pending. Title 28 § 1471(e) is quite clear. Said statute sets out:

> "The bankruptcy court in which a case under Title 11 is commenced shall have exclusive jurisdiction of all of the property wherever located, of the debtor, as of the commencement of the case."

As in the Petitioners' case, the reorganization court is given jurisdiction over the property of the debtor "wherever located" and this jurisdiction extends over property of the Debtor pledged as collateral security for debts, as well as other property belonging to

him. See Continental Illinois National Bank and Trust Co. v. Chicago Rock Island & Pacific Ry. Co., 294 U.S. 648, 675, 55 S. Ct. 595, 79 L. Ed. 1110.

The ruling circuit, the Eleventh Circuit, being petitioned for review, said 11 U.S.C. § 541(a)(7) brings into the estate every interest not covered by a specific provision mandating another treatment; In re Wilson, 694, F. 2d 236 (11 Cir. 1982).

Further, if property recovered was merely out of the possession of the debtor, yet remained "property of the debtor" the debtor's interest in property also includes "title" to property, which is an interest, the result of Segal v. Rochelle, 382 U.S. 375 (1966) [86 S. Ct. 511, 15 L. Ed. 2d 428], is followed.

Title 28 U.S.C. § 1334(d) gives the commencement bankruptcy court exclusive jurisdiction over property in two

categories, The jurisdiction over (1) property of the debtor at the commencement of the case; and (2) property of the estate.

This jurisdiction over property literally deprives other courts of jurisdiction, even if the judge of court being so superseded is on what may be called a higher rung of the judicial ladder than the bankruptcy judge who will have initial handling of the case. For example bankruptcy jurisdiction supersedes admiralty jurisdiction over a vessel; In re Louisiana Ship Management, Inc., 761 F. 2d 1025 (5 Cir. 1985).

It is settled law that upon the filing of a petition under Chapter 10 of the Bankruptcy Act (now Chapter 11 of the Bankruptcy Code), all property in which the debtor has an interest passes under the control of the bankruptcy court, and upon approval of the petition, title

vests in the trustee or the debtor-in-possession as of the date of the filing of the petition. See Gross v. Irving Trust Company, 289 U.S. 342, 344, 53 S. Ct. 605, 77 L. Ed. 1243, 90 A.L.R. 1215; Isaacs v. Hobbs Tie & Timber Company, 282 U.S. 734, 737, 51 S. Ct. 270, 75 L. Ed. 645.

Further, pursuant to Bankruptcy Rule 1007, corporate stock standing in the name of a debtor should be included in his schedule, although hypothecated for its full value; In re Hirsch, D.C. Tenn. 1899, 96 F. 468, 2 Am. Bankr. Rep. 715. (See Appendix 8.)

Third parties that acquire debtor's property during the case are statutorily required to return property of the estate to the bankruptcy trustee or debtor-in-possession pursuant to Title 11 U.S.C. § 542; if the Petitioners/Debtors may use, sell, or lease the property under 11

U.S.C. § 363.

This Honorable Court has made clear that no matter who has custody, or where the property is located, the trustee is entitled to it as property of the estate; United States v. Whiting Pools, -U.S.-, 103 S. Ct. 2309 76, L. Ed. 2d 515, 10 B.C.D. 705 (1983).

This Honorable Court, in 1961, set out that the trustee's avoiding powers speak of the situations as of the date of the petition for relief in bankruptcy; Lewis v. Manufacturers National Bank of Detroit, 364 U.S. 603, 81 S. Ct. 347, 5 L. Ed. 2d 323 (1961).

Since Title 11 § 362 (the automatic stay) is effective on all of Petitioners/ Debtors' property as of October 6, 1980, and no proceeding has been put before the commencement court for lift of stay (see Appendices 7 and 8), said stay is effective from October 6, 1980 to and

including this date.

This Court has set out that acts taken in violation of the automatic stay are "null and void"; Kalb v. Feuerstein, 308 U.S. 433 60 S. Ct. 343, 84 L. Ed. 370 (1940), mandate conformed 234 Wis. 507 291 N.W. 840 (1940).

The violation of the stay can be contempt. This is redressable to the injured party with damages limited to actual injury; In re De Jesus Saez, 721 F. 2d 848, 11 B.C.D. 785 (1 Cir. 1983).

The problem has been raised of which court may interpret the applicability of the stay and what is the priority among courts. The Second Circuit ruled that both the court in which an action claimed to be stayed and the bankruptcy court may determine the application. Even where the reorganization is large and complex and a threat exists of conflicting decisions in various courts, the equities

favor maintenance of the unfettered authority of the bankruptcy court; In re Baldwin-United Corp. Litigation, 765 F. 2d 343, 13 B.C.D. 425 (2 Cir. 1985).

Pursuant to Title 11 U.S.C. § 361, adequate protection and Title 11 U.S.C. § 362 automatic stay, creditor protection is set out. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Section 361(a) defined the scope of the automatic stay by listing the acts that are stayed by the commencement of the case. All proceedings are stayed including arbitration, administration and judicial proceedings. Section 362(2) stays the enforcement against the debtor or against the property of the estate. Section 362(3) stays any act to obtain possession of property of the estate (i.e., property of the debtor as of the date of filing of the petition) or

property from the estate.

The purpose of this provision is to prevent dismemberment of the estate. The concept of adequate protection as set out hereinabove, is derived from the Fifth Amendment protection of property interest as enunciated by this Honorable Court; Wright v. Union Central Life Insurance Co., 311 U.S. 273 (1940) [61 S. Ct. 196, 85 L. Ed. 184, rehearing denied 61 S. Ct. 445, 312 U.S. 711, 85 L. Ed. 1142]; Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) [55 S. Ct. 854, 79 L. Ed. 1593].

RES JUDICATA

Res judicata was addressed by Petitioners in Plaintiffs' Answer and Response in Opposition to Defendants' Motion for Summary Judgment, United States Bankruptcy Court, Northern District of Georgia, Newnan Division, entered April 21, 1987.

Res judicata was addressed by Petitioners in Movants' Reply Memorandum in Response to Defendants' Answer and Response to Plaintiffs/Debtors-in-Possession's Motion for Summary Judgment entered July 7, 1987, United States Bankruptcy Court, Northern District of Georgia, Newnan Division.

Res judicata was addressed by Petitioners in Appellants' brief filed September 18, 1987 in the United States District Court for the Northern District of Georgia, Newnan Division.

Res judicata was addressed by petitioners in Response of Appellants in Opposition to Appellees' Memorandum of Law entered October 20, 1987 in the United States District Court for the Northern District of Georgia, Newnan Division.

Res judicata was addressed by Petitioners in Brief of Appellants, Jack

R. Whitehorn and Mary Ruth Whitehorn entered on February 22, 1988, United States Court of Appeals for the Eleventh Circuit.

Res judicata was addressed in Reply Brief of Appellants in Opposition to Appellees' Original Memorandum of Law entered April 7, 1988 in the United States Court of Appeals for the Eleventh Circuit.

The following elements still preclude the doctrine of res judicata being applicable in the case of Petitioners/Debtors, and further, these elements are sound reasoning for a grant of writ of certiorari.

(A) The subject matter of the complaint was not settled by a judicial judgment.

(B) A court must be within its jurisdiction to issue a judgment.

(C) The parties were not identical as set out in complaint and other

proceedings referred to by the lower court.

As set out in (A) hereinabove, no turnover proceeding was filed in the case before the complaint. The time frame will show the Court there was no possible course to invoke the doctrine of res judicata. First, the Appellees (Defendants) set out that they sold/ cancelled the property on or about August 18, 1981. The final outcome of the two proceedings filed to recover said property (deciding ownership) as discussed herein (under Statement of Case), proceeding No. 80-0034N -- the court abstained from hearing said proceeding, Case No. 81-0039N -- was found moot, no judicial decision in either proceeding to apply the doctrine of res judicata. There must be a conclusiveness of judgment to apply said doctrine.

As set out in (B) hereinabove, the

Georgia bankruptcy court does not have jurisdiction over the "stock," property titled to Petitioners/Debtors. The commencement court of Petitioners/ Debtors, the United States Bankruptcy Court, District of Nevada, has exclusive jurisdiction over the property of the estate as discussed herein pursuant to 28 U.S.C. § 1471(e). Further, Bankruptcy Rule 7070 sets out:

> "Rule 70 F.R. Civ. P. applies in adversary proceedings and the court may enter a judgment divesting the title of any party and vesting title in others whenever the real or personal property involved is within the jurisdiction of the court." (Emphasis added.)

The Appellees rely on the order of the United States District Court entered on September 18, 1981. The said order granted and sustained the motion of Appellees to dismiss the appeal as moot. The court set out: "The issue of the propriety of the sale of stock is not

properly before this court."

Orders on motion have been said to be res judicata only on the matters adjudicated under the motions; Miney v. Detroit & Cleveland Nav. Co., D.C.N.Y. 96 F. Supp. 505. So, finality within the doctrine of res judicata does not attach to every ruling on law made by a judge on the decision of a motion; Hill v. U.S. ex rel. Wampler, Pa., 56 S. Ct. 760, 298 U.S. 460, 890 L. Ed. 1283.

Moreover, even at this date, the automatic stay is still protecting the property of Petitioners/Debtors from October 6, 1980, 11 U.S.C. § 362(a)(1)(3), (see Appendices 7 and 8) even though Appellees claim to have sold/ cancelled or traded the property. The order (if any) to sell/cancel or trade the property is void for want of jurisdiction over property.

As set out in (C) hereinabove, the

parties involved in proceedings set out herein were not the same as the Petitioners named in the complaint. An order is not res judicata where the essential element of identity of parties is lacking.

The Southmark Case cited by Appellees and the lower court does not represent facts similar to this reviewable instant case. Two distinct facts separate the case, and without question, distinguish the cited case from the petitioned case.

Only one element of the two facts set out is needed to preclude res judicata.

First: A case for the doctrine of res judicata to apply must be within the court's jurisdiction -- Southmark was, the petitioned case was not.

Second: The officer and majority stockholder of Southmark was not,

himself, in a personal reorganization proceeding in a different district and the stock protected by 11 U.S.C. § 362 as the Petitioner's case.

The Petitioners/Debtors want to be clear on the following. If the WFDR, Inc. proceeding was a legal voluntary case (and Petitioners believe not), then:

1. The Georgia bankruptcy court had full jurisdiction over the property of the corporation, i.e., chairs, typewriters, broadcast equipment, etc., but not Petitioners' property, the stock.

2. The corporation did not have treasurer stock.

3. The stock was issued to Jack Whitehorn, therefore, not a part of the corporate assets.

4. The issued 100 percent stock was titled to Jack Whitehorn and became a part of the Whitehorn estate, exclusively under the jurisdiction of United States Bankruptcy Court, District of Nevada on October 6, 1980, protected by 11 U.S.C. § 362, and

still protected by statute; no proceeding to lift stay has been filed, as discussed herein.

The automatic stay, 11 U.S.C. § 362, is one of the fundamental debtor protections provided by the bankruptcy statutes. Subsection (a) defines the scope of the automatic stay, by listing the acts that are stayed by the commencement of the case. All proceedings are stayed, including arbitration, administrative and judicial proceedings. Further, any trial wherein the appearance of justice is lacking is barred by the Fifth Amendment as lacking in due process; In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955).

It has just come to the attention of Petitioners/Debtors that Defendant/ Appellee Margaret H. Murphy was appointed United States Bankruptcy Judge for the Northern District of Georgia and assumed

duties on October 19, 1987.

The reviewing district court's order was not entered until December 23, 1987. The said district court is the United States District Court for the Northern District of Georgia, Newnan Division -- the same district in which Murphy was appointed a bankruptcy judge before the order was entered.

The Judicial Council and the United States Court of Appeals for the Eleventh Circuit had already appointed Appellee Murphy as a bankruptcy judge before acceptance of any pleading by Petitioners/Debtors pertaining to the case being petitioned to this Honorable Court for writ of certiorari.

Pursuant to Title 28 § 455(a)(d)(1), the District Judge as well as the Eleventh Circuit Panel should have disqualified themselves.

No disclosure was even made in any

pleadings of Murphy or by said courts to Petitioners/Debtors so waiver could be acted on.

Further, the aforementioned act may be relevant to the circuit court's denial of Petitioners/Debtors' motion for further stay of mandate and denial of Petitioners/Debtors motion to strike Appellees' response and for sanctions against Edward C. Brewer, III, an Atlanta lawyer. (See Appendix 10.)

Constitutional due process and Petitioners' civil rights have been denied by such an act as set out hereinabove.

CIVIL RIGHTS ACT OF 1964

These Petitioners/Debtors' civil rights have been violated by Appellees' disregard of the automatic stay. This Honorable Court has set out that the Civil Rights Act covers federal statutory rights as well as constitutional ones; Maine v. Thiboutot, 448 U.S. 1, 100 S.

Ct. 2502, 65 L. Ed. 2d 555 (1980).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Jack R. Whitehorn
Petitioner/Debtor

Mary Ruth Whitehorn
Petitioner/Debtor

5141 Indian River Drive, Box 377
Las Vegas, Nevada 89103-6148
(702) 367-2102

This 10th day of October 1988

Jack Whitehorn
Appearing Pro se
5141 Indian River Drive, Box 377
Las Vegas, Nevada 89103-6148
(702) 367-2102

P. Steven Kratsch
Edward C. Brewer, III
Attorneys at Law
Smith, Gambrell & Russell
2400 First Atlanta Tower
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(404) 656-1800
Attorneys of Record for Appellees

Case No. 88-8018

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

IN RE:
JACK R. WHITEHORN AND
MARY RUTH WHITEHORN,
DEBTORS,
JACK R. WHITEHORN AND
MARY RUTH WHITEHORN,
PETITIONERS,

V.

MARGARET H. MURPHY AND LAW FIRM:
SMITH, GAMBRELL & RUSSELL,
DEFENDANTS (APPELLEES).

AFFIDAVIT OF SERVICE

STATE OF NEVADA *
COUNTY OF CLARK *

Jack R. Whitehorn, being first duly sworn, deposes and says that the following set out information is true and correct:

That on the 14th day of October 1988, I mailed three true and correct copies of the

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES PURSUANT TO TITLE 28 U.S.C. § 1254

to Attorneys for Appellees/Defendants:

P. Steven Kratsch
Edward C. Brewer, III
Attorneys at Law
Smith, Gambrell & Russell
2400 First Atlanta Tower
Atlanta, Georgia 30383

by placing same in a properly addressed envelope with first class postage prepaid and mailed by United States Mail from Las Vegas, Nevada.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on Oct 11, 1988

Signature Jack Blakeman

Subscribed and sworn to before me this 11 day of October 1988.

(Seal)

Notary Public-State Of Nevada
COUNTY OF CLARK
SHEILA L. COLEMAN
My Appointment Expires
Aug. 12, 1989

Sheila L. Coleman
Notary Public

Case No. 88-8018

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

IN RE:
JACK R. WHITEHORN AND
MARY RUTH WHITEHORN,
DEBTORS,
JACK R. WHITEHORN AND
MARY RUTH WHITEHORN,
PETITIONERS,

V.

MARGARET H. MURPHY AND LAW FIRM:
SMITH, GAMBRELL & RUSSELL,
DEFENDANTS (APPELLEES).

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

VERIFIED PETITION FOR PERMISSION TO APPEAR PRO SE IN THE ABOVE CAPTIONED CASE PRO HAC VICE

Jack R. Whitehorn Petitioner/Debtor respectfully shows this Honorable Court the following:

That he resides at 5141 Indian River Drive, Box 377, city of Las Vegas, county of Clark, state of Nevada, zip code 89103-6148, telephone number (702) 367-2102;

That this cause of action arises from a bankruptcy proceeding;

That legal representation of record has abandoned this estate without notice to court;

And Jack R. Whitehorn has been proceeding pro se with and from the filing of a disclosure statement and plan of reorganization in the United States Bankruptcy Court, District of Nevada, October 2, 1985.

Petitioner respectfully prays that he be allowed to continue appearing pro se in this Honorable Court for the purposes of the above captioned case only.

Jack R. Whitehorn
Petitioner/Debtor

STATE OF NEVADA *

COUNTY OF CLARK *

Jack R. Whitehorn, Petitioner/Debtor, being first duly sworn, deposes and says:

That the foregoing statements are true.

Jack R. Whitehorn
Petitioner/Debtor

Subscribed and sworn to

Before me this 13th day of 1988 October

Kathleen Ischo
Notary Public

KATHLEEN ISCHO
Notary Public, State of Nevada
Appointment Recorded in Clark County
My Appointment Expires July 16, 1992

88-647

FILED
OCT 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 88-8018

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

IN RE:
JACK R. WHITEHORN AND
MARY RUTH WHITEHORN,
DEBTORS,

JACK R. WHITEHORN AND
MARY RUTH WHITEHORN,
PETITIONERS,

V.

MARGARET H. MURPHY AND LAW FIRM:
SMITH, GAMBRELL & RUSSELL,
DEFENDANTS (APPELLEES).

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES
PURSUANT TO TITLE 28 U.S.C. § 1254**

APPENDIX

Jack Whitehorn
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Attorneys of Record for Appellees

Case No. 88-8018

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

IN RE:
JACK R. WHITEHORN AND
MARY RUTH WHITEHORN,
DEBTORS,
JACK R. WHITEHORN AND
MARY RUTH WHITEHORN,
PETITIONERS,

V.

MARGARET H. MURPHY AND LAW FIRM:
SMITH, GAMBRELL & RUSSELL,
DEFENDANTS (APPELLEES).

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES
PURSUANT TO TITLE 28 U.S.C. § 1254**

APPENDIX

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Appendix 1

Complaint Filed by Petitioner/

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Answer by Appellees

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

Adversary Proceeding No. 860045

COMPLAINT TO COMPEL TURNOVER OF PROPERTY

Entered April 3, 1986

COME NOW Jack R. Whitehorn and Mary Ruth Whitehorn, Debtors-in-Possession in the above captioned case and respectfully show the Court as follows:

1. Plaintiffs are duly qualified and Debtors-in-Possession in this case.

2. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §1471 and 11 U.S.C. §542.

3. This adversary proceeding is brought by the Plaintiffs, Jack R. Whitehorn and Mary Ruth Whitehorn, as Debtors-in-Possession, and asserts that the Debtors-in-Possession are entitled to have property, namely one hundred percent (100%) of WFDR, Inc. stock turned over or sold to Defendants named in the caption

of this proceeding. The said stock was issued and titled to Jack Whitehorn, Certificate No. 1 for 50 shares and Certificate No. 2 for 5000 shares on December 1, 1969 and has never been transferred by Jack Whitehorn or by order of this Court.

(A)

The said stock was pledged, in addition to corporate assets to the Citizens State Bank, Butler, Georgia, as additional collateral for corporate loans, renewals and/or extensions.

(B)

On July 23, 1979, a refinancing plan was completed by WFDR, Inc. with Plaintiff as one hundred percent stockholder, President and sole Director with the Citizens State Bank, Butler, Georgia. The said stock was pledged and left with said bank as additional collateral; no power of attorney for

transferring said stock was included in the transaction.

(C)

On March 28, 1980, Plaintiff, Jack Whitehorn, executed a stock option with blood brother, John F. Whitehorn.

(D)

On May 8, 1980, Plaintiff, Jack Whitehorn, disavowed said Stock Option and asserted full and complete authority over the corporation and its holdings as President, sole Director and 100% stockholder.

(E)

On May 9, 1980, without Plaintiff, Jack Whitehorn's knowledge or approval or any corporate resolution, and with Defendants' sole direction, WFDR, Inc. was placed in a Chapter 11 proceeding in the United States Bankruptcy Court for the Northern District of Georgia, Newnan Division, Bankruptcy No. 80-00136N.

(F)

The above captioned Defendants allegedly acted as attorneys for the Debtor-in-Possession corporation as well as Estate Administrator.

(G)

On July 24, 1980, an adversary proceeding was filed on behalf of Plaintiffs in the United States Bankruptcy Court, Northern District of Georgia, Newnan Division, being Adversary Case No. 80-0034N. The Court subsequently abstained from hearing said proceeding.

(H)

On October 6, 1980, the Plaintiffs filed a Chapter 11 proceeding in the United States Bankruptcy Court, District of Nevada, effecting the automatic stay under 11 U.S.C. §362, Case No. BK-LV-80-936. The said stock was, on October 6, 1980, property of Plaintiff.

Citizens State Bank, holder of said stock was so noticed of automatic stay, along with WFDR, Inc. and Defendant law firm. No Plan of Reorganization by WFDR, Inc. had been offered and/or filed with the United States Bankruptcy Court, Northern District of Georgia, Newnan Division on October 6, 1980.

(I)

On December 8, 1980, a preference action against John F. Whitehorn was filed by Plaintiffs in this Honorable Court for the purpose of recovering the one hundred percent (100%) WFDR, Inc. stock.

(J)

Upon motion to change the venue of the case by John F. Whitehorn to this Court, the Honorable Judge Lloyd D. George, presiding, transferred only the adversary proceeding No. 800197 filed in Case BK-LV-80-936 to the United States

Bankruptcy Court, Northern District of Georgia, Newnan Division and retained jurisdiction of Plaintiffs' Chapter 11 proceeding, Case No. BK-LV-80-936.

(K)

During the period of time the Plaintiffs' transferred adversary proceeding was being prepared by Counsel and/or heard by Judge W. Homer Drake, United States Bankruptcy Court, Northern District of Georgia, Newnan Division, Adversary Proceeding No. 81-0039N, the Defendants, acting under color of the law, influenced the Citizens State Bank to turn over or sell Plaintiff's stock to Defendants while having full knowledge of Plaintiffs' Chapter 11 proceedings in this Honorable Court and the effective automatic stay. No hearing was held before this Court for lifting of the automatic stay protecting Plaintiffs' property, i.e. the said one hundred

percent of WFDR, Inc. stock.

(L)

On or about August 18, 1981, Defendants took possession of Plaintiff's property, one hundred percent (100%) of WFDR, Inc. stock issued and titled to Jack Whitehorn. It has been disclosed that Defendants, after taking or buying said stock from said bank, sold, cancelled or traded Plaintiff's stock without Plaintiff's or this Court's authorization, a direct contempt of this Honorable Court.

(M)

The adversary case transferred from this Honorable Court to United States Bankruptcy Court, Northern District of Georgia, Newnan Division, Case No. 81-0039N, was tried December 16, 1981 and January 27, 1982, after the said stock had been turned over or sold to Defendants by said bank. An Order

entered on August 18, 1982, found the Stock Option Agreement a voidable preference. Said Order was appealed by John F. Whitehorn. The United States District Court vacated said order remanding back to the Bankruptcy Court for compliance with Bankruptcy Rule 752 and issues raised in Appellees §547. Judge Drake did not respond. A final Order was signed on the 25th day of January, 1984 by Judge W. Homer Drake, entered on January 26, 1984. Plaintiff objected but did not appeal the Order. No appeal was noticed by any other party.

The said Order by Judge Drake states: "The preference action successfully brought by Jack Whitehorn against Dr. John Whitehorn regarding the pre-petition transfer of stock has been remanded to this Court for additional findings of fact. However, that preference action has become moot under

the terms of the settlement by which Dr. John Whitehorn disavows any interest in the equity of the Debtor."

(N)

A written request was made to Defendants, November 2, 1984, for books and records of WFDR, Inc., including without limitation to stock certificates. Said communication requested a written response.

(O)

On November 12, 1984, written response was received from Defendants, denying Plaintiff's property that has been awarded pursuant to Court Order.

4. The stock is property which Plaintiff may use, sell or lease under 11 U.S.C. §363.

5. Plaintiff has requested delivery of said stock to him and the Defendants have failed and refused, and continue to fail and refuse to deliver

the same to him.

WHEREFORE Plaintiff prays that Defendants be ordered to surrender possession forthwith of said stock certificates, all assets said stock owns, including but not limited to Accounts Receivables, corporate books, records, bank records, cash, records of all transactions subsequent to May 8, 1980 to him and that he have such other and further relief as is just.

Dated April 3rd, 1986.

Respectfully submitted,

Jack R. Whitehorn

Debtor-in-Possession

Mary Ruth Whitehorn

Debtor-in-Possession

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

Adversary Proceeding No. 860045

ORDER

ENTERED JULY 1, 1986

On Motion of the Plaintiffs for Leave to Amend Pleadings as Specified on the Original Complaint,

IT IS CONSIDERED, ORDERED AND DECREED that said Motion be, and the same is hereby allowed and that said Complaint be, and the same is hereby amended as follows:

Paragraph 1

"Plaintiffs are duly qualified as Debtors-in-Possession in this case, that the above named Debtors on October 6, 1980 filed a voluntary petition for relief under Chapter 11 Title 11, United States Code and on October 6, 1980, an Order was duly made and entered granting relief under said Chapter 11."

Paragraph 2

"This is an adversary proceeding brought pursuant to Bankruptcy Rule 7001(1) to recover property belonging to the above entitled estate, of which this Court has jurisdiction under the provisions of Title 28 U.S.C. §157(b)."

Dated this 25th day of June 1986.

UNITED STATES BANKRUPTCY COURT

Robert Clive Jones

Chief Bankruptcy Judge

* * * *

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

Adversary Proceeding No. 860045

ANSWER TO COMPLAINT TO COMPEL TURNOVER OF PROPERTY

Entered on or about May 5, 1986

COMES NOW, Margaret H. Murphy and the law firm of Smith, Gambrell & Russell, named as defendants herein, and answer plaintiffs' Complaint to Compel

Turnover of Property as follows:

FIRST DEFENSE

Plaintiffs' complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

This Court lacks subject matter jurisdiction.

THIRD DEFENSE

This Court lacks personal jursidiction over Margaret H. Murphy and the law firm of Smith, Gambrell & Russell.

FOURTH DEFENSE

Plaintiffs' complaint fails to state a claim upon which relief may be granted in that all actions taken by attorney Margaret H. Murphy and the law firm of Smith, Gambrell & Russell with respect to the WFDR, Inc. stock at issue were pursuant to court orders issued by the United States Bankruptcy Court for the Northern District of Georgia, Newnan

Division.

FIFTH DEFENSE

Plaintiffs' claims are barred by their failure to join necessary parties in accordance with Fed. R. Civ. P. 19.

SIXTH DEFENSE

Plaintiffs' claims are barred by the doctrines of res judicata.

SEVENTH DEFENSE

Plaintiffs' claims are barred by the doctrine of collateral estoppel.

EIGHTH DEFENSE

Plaintiffs' claims are barred by the doctrine of laches.

NINTH DEFENSE

Plaintiffs' claims are barred in that there has been a satisfaction and accord. Plaintiff, Jack Whitehorn was paid $35,000 for the stock at issue pursuant to court approved settlement of claims.

TENTH DEFENSE

Plaintiffs have waived any right to recover by their failure to appeal the Order entered by the Bankruptcy Court for the Northern District of Georgia, Newnan Division, dated January 25, 1984 wherein the court ruled that claims, identical to those asserted in this complaint, were moot.

ELEVENTH DEFENSE

Plaintiffs are estopped from bringing this action in that all issues related and claims asserted in their complaint were raised, argued, and briefed and adjudicated by the Honorable W. Homer Drake, Jr., U.S. Bankruptcy Judge for the Northern District of Georgia, Newnan Division, in the Chapter 11 proceeding of WFDR, Inc., Case No.80-00136-N or in other adversary proceedings before that court.

TWELFTH DEFENSE

Plaintiffs' claims are barred by the provisions of 11 U.S.C. §1141 by the confirmation of the Plan of Reorganization of WFDR, Inc., Case No. 80-00136-N, which Plan was confirmed by the United States Bankruptcy Court for the Northern District of Georgia, Newnan Division.

THIRTEENTH DEFENSE

Responding to the specific numbered paragraphs of plaintiffs' complaint, defendants answer as follows:

1.

Defendants lack knowledge or information sufficient to form a belief as to the allegations of paragraph number 1.

2.

Denied.

3.

Denied. By way of further response, defendants state they do not have the

stock and that said stock was sold pursuant to a Chapter 11 Plan of Reorganization to Provident Broadcasting Corporation pursuant to orders of the U.S. Bankruptcy Court for the Northern District of Georgia, Newnan Division, dated March 16, 1981, April 9. 1981 and June 29, 1981.

A.

Defendants lack knowledge or information sufficient to form a belief as to the allegations of paragraph A in that they are unaware of the specific transaction for which the stock was pledged. Defendants admit that the stock at issue was pledged to Citizens State Bank, Butler, Georgia. Except as expressly admitted, paragraph A is denied.

B.

Defendants lack knowledge or information sufficient to form a belief

as to the allegations of paragraph B.

C.

Defendants lack knowledge or information sufficient to form a belief as to the allegations of paragraph C. By way of further response, Defendants state that plaintiff's brother, Dr. John Whitehorn, had a proxy to vote all of the shares of WFDR, Inc. and, by an appropriate corporate resolution, WFDR, Inc. filed a Chapter 11 Bankruptcy Petition.

D.

Defendants lack knowledge or information sufficient to form a belief as to the allegations of paragraph D.

E.

Denied. By way of further response to paragraph E, defendants state that Margaret H. Murphy and the law firm of Smith, Gambrell & Russell acted as attorneys for WFDR, Inc. and that WFDR,

Inc. filed a Chapter 11 proceeding pursuant to an appropriate corporate resolution authorizing same.

F.

Defendants admit that they acted as attorneys for the debtor-in-possession corporation and as Estate Administrators pursuant to orders issued by the Bankruptcy Court for the Northern District of Georgia, Newnan Division, dated May 15, 1980 and May 29, 1980. Except as expressly admitted, paragraph F is denied.

G.

Admitted.

H.

Defendants lack knowledge or information sufficient to form a belief as to the plaintiffs' filing of a Chapter 11 proceeding in the United States Bankruptcy Court, District of Nevada and as to the ownership of the stock on

October 6, 1980. Defendants admit that, as of October 6, 1980, no Plan of Reorganization by WFDR, Inc. had been filed with the United States Bankruptcy Court, Northern District of Georgia, Newnan Division. Except as expressly admitted, paragraph H is denied.

I.

Defendants lack knowledge or information sufficient to form a belief as to the allegations of paragraph I. By way of further response to paragraph I, defendants state that the records of this Court speak for themselves.

J.

Defendants lack knowledge or information sufficient to form a belief as to the allegations of paragraph J except that defendants admit that plaintiffs' adversary proceeding No. 80-0197 against Dr. John Whitehorn was transferred to the U.S. Bankruptcy Court,

Northern District of Georgia, Newnan Division. By way of further response to paragraph J. defendants state that the records of this Court speak for themselves.

K.

Denied. By way of further response to paragraph K, defendants state that all actions taken by them with respect to the stock at issue were pursuant to orders entered by the U.S. Bankruptcy Court for the Northern District of Georgia, Newnan Division.

L.

Denied. By way of further response to paragraph L, defendants state that, in a simultaneous closing transaction for the sale of WFDR, Inc. stock pursuant to its confirmed Plan of Reorganization, a portion of the proceeds from the sale of the stock were paid over to satisfy the indebtedness of the primary secured

lender for WFDR, Inc., Citizens State Bank, Butler, Georgia. Said lender then released the stock certificates which, pursuant to the Plan of Reorganization, were cancelled and reissued to Provident Broadcasting Corporation, the purchaser of said shares.

M.

Defendants lack knowledge or information sufficient to form a belief as to the allegations of paragraph M with respect to the dates of trial. The orders and court records of the United States District Court for the Northern District of Georgia speak for themselves; however, defendants admit that plaintiffs did not appeal the final order of the Honorable Judge W. Homer Drake, Jr. entered on January 26, 1984 and that said order became a final order. Except as expressly admitted, paragraph M is denied.

N.

Defendants admit receipt of a letter dated November 2, 1984; admit that a request was made for the books and records of WFDR, Inc. and admit a written response was requested. By way of further response to paragraph N, defendants state that the "cancelled stock certificate" was requested. Except as expressly admitted, paragraph N is denied.

O.

Defendants admit that they responded to plaintiffs' letter dated November 2, 1984. By way of further response, defendants state that the letter speaks for itself as to its terms, conditions and effects. By way of further response, defendants state that Jack Whitehorn was advised that the books and records were transferred to the stock purchaser, Provident Broadcasting Corporation.

Except as expressly admitted, paragraph O is denied.

4.

Denied.

5.

Defendants admit that Jack R. Whitehorn has requested delivery of the stock to him and admit that the stock has not been delivered to him. By way of further response, defendants state that the stock was disposed of pursuant to the court-approved Plan of Reorganization of WFDR, Inc. and that, as part of that Plan, his interest, represented by two "Certificates of Interest" which were distributed to him following the closing of the stock sale, were satisfied pursuant to the order of the Court entered on January 26, 1984. The Bankruptcy Court for the Northern District of Georgia, Newnan Division, approved a settlement that granted

plaintiff Jack R. Whitehorn the sum of $35,000, which payment satisfied in full any claim he might have had as a shareholder in the WFDR, Inc. bankruptcy proceeding. Except as expressly admitted, paragraph 5 is denied.

WHEREFORE, having fully responded to plaintiffs' complaint, defendants pray that this action be dismissed with prejudice, and that all costs be cast upon the plaintiffs.

Dated this 5 day of May, 1986.

LIONEL SAWYER & COLLINS

By Linda Riegle

Attorneys for Defendants

SMITH, GAMBRELL & RUSSELL

By Linda Riegle

for Joyce B. Klemmer

Appendix 2

Grant of Appellants'

Motion for Stay of Mandate

Entered August 16, 1988

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Case No. 88-8018

GRANT OF APPELANTS' MOTION

FOR STAY OF MANDATE

ENTERED AUGUST 16, 1988

The motion of appellants for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including Sept. 20, 1988, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above

mentioned certificate shall be filed with the Clerk of this Court within that time.

Phyllis Kravitch

United States Circuit Judge

* * * *

A Motion for Enlargement of Time for Stay of Mandate, Entered Sept. 16, 1988; Appellees' Objection to Said Motion Filed on or about Sept. 19, 1988; Petitioners/ Appellants Motion to Strike Appellees' Pleadings, Filed on or about Sept. 22, 1988. See Order entered at Appendix 10.

PUBLISHER'S NOTE :

The following pages are unavailable for filming: 33 thru 46

stock was cancelled and newly issued stock sold to Provident Broadcasting Company (Provident), the successor to Lake George Corporation.

One month after this sale, on September 18, 1981, this court dismissed as moot Whitehorns' appeals of the March 16, and April 8, 1981, orders approving the sale of assets since the sale of stock in lieu of the sale of assets had been approved and consummated. This court noted that the order approving the sale of the stock had not been appealed and that no stay of the sale was sought or obtained. The Eleventh Circuit affirmed this court's dismissal of the appeals as moot.

In the adversary proceeding between Whitehorns and Dr. John Whitehorn, the bankruptcy court entered an order in this matter on August 18, 1982, finding that the transfer to Dr. John Whitehorn was a

voidable preference. This court vacated that order and remanded for further findings. The bankruptcy court treated these proceedings as moot after it approved settlement agreement described below.

On July 14, 1983, the defendants, as Estate Administrators, and the Creditors' Committee of WFDR filed a joint application to settle claims which provided, among other things, that upon partial payment of certain administrative and unsecured claims of Dr. John Whitehorn, Dr. John Whitehorn would relinquish his claim to ownership of the shares in WFDR, which would then be deemed to be held free and clear by Jack Whitehorn. The application of settlement further proposed that, pursuant to Jack Whitehorn's ownership interest, payment of $35,000 would be made from the remaining funds held by the WFDR Estate

Administrator to Jack Whitehorn's attorneys.

On January 26, 1984, the bankruptcy court entered two orders approving the proposed settlement including the payment to Jack Whitehorn's attorneys. The payment to Jack Whitehorn's attorneys from the WFDR proceeding was specifically authorized by an order from the District of Nevada where Whitehorn's personal bankrutpcy proceeding is pending. The $35,000 payment was made to Jack Whitehorn's attorneys after the filing of an application to pay administrative expenses. On November 15, 1984, a final decree was entered closing the estate of WFDR.

Whitehorns initiated the present proceeding by filing a "Complaint to Compel Turnover" on April 3, 1986 in the United States Bankruptcy Court for the District of Nevada, where plaintiffs'

Chapter 11 case is pending. In their complaint, Whitehorns seek to require defendants to "surrender possession" of the stock to WFDR and "all assets said stock owns, including but not limited to Accounts Receivables, corporate books, records...[etc.]." Whitehorns initiated this proceeding pro se and continue to proceed pro se.

On cross motions for summary judgment, the bankruptcy court granted the defendants' motion and denied the plaintiffs' motion. The bankruptcy court identified two alternate grounds for the grant of defendants' motion. First, the court found that Whitehorns' claim is barred by the doctrine of res judicata. Second, the court below granted defendants' motion to amend their answer by adding the statute of limitations as an affirmative defense and then held that Whitehorns' claim is time barred "to any

extent that it...seeks to avoid a post-petition transfer, because the action was not commenced within two years of the transaction sought to be avoided."

Res Judicata

Whitehorns, proceeding pro se in this appeal, describe twelve "Points Upon Which The Appeal is Predicated." (Appellants' Brief at 5-9). Within these twelve points, it appears that appellants' only argument concerning the bankruptcy court's finding that their claim for turnover is barred by the doctrine of res judicata is that the bankruptcy court did not have jurisdiction to issue the prior orders permitting the cancellation and sale of the stock of WFDR. Appellants assert that the bankruptcy court did not have jurisdiction because the stock was appellants' property and could not be disposed of or otherwise impaired without

lifting the automatic stay in effect in appellants' personal bankruptcy case pending in Nevada.

The primary issue on this appeal is whether the court had jurisdiction to issue the order approving the sale of assets to WFDR and the order approving the amended reorganization plan pursuant to which the stock of WFDR was cancelled. Appellants argue that the bankruptcy court's order affirming the settlement of claims resolving the dispute between John and Jack Whitehorn over the ownership of the WFDR stock clearly determined that the stock was the property of Jack Whitehorn. Since the stock was the property of Jack Whitehorn, plaintiffs contend that it could not have been cancelled and new stock sold to Provident without lifting the stay in the Whitehorns' personal bankruptcy case.

As the bankruptcy court noted, the

Whitehorns' ownership in the stock gave them only a certain bundle of rights and these rights were not affected by the cancellation of the stock and the issuance of the certificates of interest in the proceeds of the sale to Provident. Whitehorns' personal bankruptcy proceeding could not stay the ministerial act of cancellation of shares by the corporated debtor-in-possession any more than any individual shareholder's bankruptcy could stay the fluctuation of the market price of such individual's shares. Thus the bankruptcy court did not err in concluding that it had jurisdiction to enter the orders approving the sale of new stock which was sold to Provident with the former shareholders receiving certificates of interest in the proceeds of the sale.

The appellants have not contested the bankruptcy court's findings with regard to the other elements required for

res judicata. See Kemp v. Birmingham News Co., 608 F.2d 1049, 1052 (5th Cir. 1979) ("For a prior judgment to bar an action on the basis of res judicata, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases.") The bankruptcy court did not err in finding that Whitehorns' claim is barred by the doctrine of res judicata. See Southmark Properties v. Charles House Corporation, 742 F.2d 862 (5th Cir. 1984) (upheld the application of the doctrine of res judicata to a case with facts similar to those in the case at bar).

It is not necessary for the court to address the statute of limitations issue - the alternate ground on which the

bankruptcy court granted defendants' motion for summary judgment.

For the reasons stated herein, the court affirms the order of the bankruptcy court granting appellees' motion for summary judgment and denying appellants' motion for summary judgment.

SO ORDERED, this 21 day of December, 1987.

G. Ernest Tidwell

Judge, United States District Court

Appendix 6

United States Bankruptcy Court

for Northern District of Georgia

Newnan Division

Judgment and Order

Entered December 23, 1987

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF GEORGIA

NEWNAN DIVISION

Case Number BK-LV-80-00936

Adversary Number 87-002N

JUDGMENT

Judgment is hereby entered for the defendants in the above-styled adversary proceeding in accordance with the Order of the Court entered the 31 day of July, 1987.

At Newnan, Georgia, this 31 day of July, 1987.

W. H. Drake, Jr.

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF GEORGIA

NEWNAN DIVISION

Case Number BK-LV-80-00936

Adversary Number 87-002N

ORDER

This adversary proceeding is before the Court on cross-motions for summary judgment. Plaintiffs, Jack R. Whitehorn and Mary Ruth Whitehorn ("Whitehorn"), initiated this proceeding by filing a "Complaint to Compel Turnover" on April 3, 1986, in the United States Bankruptcy Court for the District of Nevada, where the plaintiffs' Chapter 11 case is pending. On December 17, 1986, that Court entered an Order which granted the defendants' motion to transfer the adversary proceeding, but not the Chapter 11 case, to this district.

The complaint filed by Whitehorn seeks the turnover under 11 U.S.C. §542

of one hundred percent (100%) of the stock of WFDR, Inc., which is in the form of Certificate No. 1 for 50 shares and Certificate No. 2 for 5,000 shares, as well as "all assets said stock owns." WFDR, Inc. ("WFDR") was the owner of WFDR-AM and WFDR-FM radio stations in Manchester, Georgia, and a debtor in this district as a result of the filing of a petition under Chapter 11 on May 9, 1980 (Case No. 80-00136N). Defendant, Margaret H. Murphy, and the law firm of Smith, Cohen, Ringel, Kohler & Martin acted as attorneys for the corporate debtor-in-possession, WFDR, and as Estate Administrators in WFDR's Chapter 11 case. Smith, Cohen, Ringel, Kohler & Martin is the predecessor law firm to defendant, Smith, Gambrell & Russell.

The defendants seek summary jugment on the grounds that the plaintiffs' claims are barred by the doctrine of res

judicata as a result of orders entered in the Chapter 11 case of WFDR. Plaintiffs' motion for summary jugment asserts that this Court had no authority to dispose of the stock belonging to plaintiff Jack R. Whitehorn unless the stay was lifted in plaintiffs' individual Chapter 11 proceeding, which has been pending in the United States Bankruptcy Court for the District of Nevada since October 6, 1980. The material facts of this case as to which there is no genuine dispute are as follows.

Jack Whitehorn was the original sole shareholder of WFDR. On March 28, 1980, Jack Whitehorn executed a Stock Option Agreement which contained a proxy giving voting authority over the stock together with an option to acquire all of the outstanding stock to his brother, Dr. John Whitehorn. On May 9, 1980, WFDR, under management elcted through an

exercise of the proxy filed its Chapter 11 petition which commenced its bankruptcy case in this Court. Jack Whitehorn and Mary Ruth Whitehorn filed their own individual Chapter 11 case in Nevada on October 6, 1980.

On November 5, 1980, in Nevada and on July 22, 1980, in this district, Whitehorn initiated adversary proceedings against Dr. John Whitehorn, which proceedings contested ownership of the stock and control of the corporation.

On January 30, 1981, the Nevada court transferred the Nevada adversary proceeding to this district.

Also on January 30, 1981, WFDR, as debtor-in-possession, filed an application to sell its assets. Whitehorn objected to the application both as creditor of WFDR and as a claimant that he was the sole and rightful owner of all of the shares of WFDR. Following a

hearing, this court entered an Order, on March 16, 1981, approving the sale of assets for $790,000.00 to Lake George Corporation, predecessor in interest to Provident Broadcasting Company ("Provident"). On April 8, 1981, this Court denied Whitehorn's motion for a new trial, for alteration or amendment of judgment, or for additional findings of fact. Whitehorn timely noticed an appeal from the Orders of March 16 and April 8, 1981 (hereinafter "Orders approving the sale of assets") but did not seek a stay of the sale.

Before the appeal was heard by the United States District Court for the Northern District of Georgia, WFDR filed, on May 27, 1981, an "Amended Plan of Reorganization" which proposed in Articles IV and V to implement the Orders approving the sale of assets by structuring the transaction in such a way

that the outstanding stock of WFDR would be cancelled, with prior holders of such stock receiving certificates of interest in the proceeds of the sale of newly issued stock to Provident.

Whitehorn filed objections to the disclosure statement and to confirmation of the amended plan on grounds, inter alia, that the management of WFDR which had authorized the filing of the Chapter 11 petition had no power to do so. On June 29, 1981, this Court entered an Order confirming the amended plan. In the confirmation order, the Court acknowledged that there was a pending adversary proceeding between Jack and John Whitehorn regarding the equity ownership of WFDR but stated that even if "Jack Whitehorn is proven to be the owner of all the stock of WFDR, Inc., despite his objection to the plan of reorganization, the plan should be

confirmed pursuant to 11 U.S.C. §1129(b)(2)(C)." There was no appeal filed from the Order confirming the amended plan.

Following approval of the Federal Communications Commission of the transfer of control of WFDR and the filing of an application by the defendants which sought approval of the date of August 18, 1981 as the effective date of the plan, the Court entered an Order setting such date and stating that the defendants would act as Estate Administrator for the plan. The transaction with Provident in accordance with the plan was closed on August 18, 1981.

In an Order dated Setember 18, 1981, the United States District Court for the Northern District of Georgia dismissed Whitehorn's appeal for the Orders approving the sale of assets as moot "in that the amended plan providing for the

sale of the stock in lieu of a sale of the assets has been approved and consummated." The District Court also noted that the order approving the sale of stock had not been appealed from and that no stay of said sale had been obtained. On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's Order dismissing Whitehorn's appeal as moot because the order confirming the plan was not appealed and the sale authorized by the plan was not stayed.

On August 18, 1982, this Court entered an Order in an adversary proceeding between Jack Whitehorn and Dr. John Whitehorn which held that the execution by Jack Whitehorn of the stock option agreement to John Whitehorn was a preferential transfer and therefore voidable[1] under 11 U.S.C. §547. On appeal, the District Court on May 27,

1983, vacated the order finding the stock option to be a preference and remanded the proceeding to this Court for further findings.

On July 14, 1983, the defendants, as Estate Administrator, and the Creditors' Committee of WFDR filed a joint application to settle claims which provided, inter alia, that upon partial payment of certain administrative and unsecured claims of Dr. John Whitehorn, Dr. John Whitehorn would relinquish his claim to ownership of the shares in WFDR, which would then be deemed to be held free and clear by Jack Whitehorn. The application further proposed that pursuant to Jack Whitehorn's ownership interest, which would then be undisputed, payment of $35,000.00 wouldf be made from the remaining funds held by the Estate Adminstrator to Jack Whitehorn's attorneys. On January 26, 1984, this

Court entered two Orders approving the proposed settlement, which Orders included statements approving the payment to Jack Whitehorn's attorneys in recognition of his equity interest. Such a payment to Jack Whitehorn's attorneys from the WFDR proceeding for the benefit of Jack Whitehorn's individual estate had been specifically authorized by Order dated May 6, 1983, entered in the District of Nevada where Whitehorn's personal bankruptcy case is pending. The $35,000.00 payment to Whitehorn's attorneys was in fact made following the filing of an application to pay administrative expenses, and, on November 15, 1984, a final decree was entered which closed the estate of WFDR.

It is clear that the claims raised by Whitehorn in the adversary proceeding at bar have been previously addressed by this Court in the WFDR case. The

Bankruptcy Code provides:

> [T]he provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

11 U.S.C. §1141(a). Under this provision, questions which could have been raised pertaining to confirmed plan are res judicata. See Collier on Bankruptcy ¶1141.01[1] (15th ed. 1987). For a prior judgment to bar a subsequent action under the doctrine of res judicata, the parties must be the same in both suits, the prior jdugment must have been entered by a court of competent jurisidiction, there must have been a final judgment on the merits, and the

same cause of action must be involved in both cases. See., e.g., Southmark Properties v. Charles House Corporation, 742 F.2d 862, 869 (5th Cir. 1984).

Here, Jack Whitehorn, as a creditor and disputed shareholder of WFDR and by his active participation in WFDR's reorganization, was clearly a party-in-interest to the orders entered in WFDR's Chapter 11 case. The Orders approving the sale of assets, which Orders were appealed, and the confirmation order, which was not appealed, constitute final judgments on the claims raised by Whitehorn in the WFDR reorganization and, if the claims now raised by Whitehorn are the same and if this Court had jurisdiction to enter those orders, then Whitehorn is precluded from raising the same claims again.

Whitehorn's complaint seeks a turnover of the WFDR stock certificates

and "all assets said stock owns." In the Orders approving the sale of assets, this Court approved the sale of the assets of WFDR free and clear of all claims and interests and also authorized WFDR and the purchaser to restructure the transaction as a stock acquisition or merger. Such a restructuring of the deal was proposed by the amended plan which was confirmed on June 29, 1981, and which provided for cancellation of existing stock while new stock was issued to Provident, as purchaser. Whitehorn's claims challenging the sale of assets or the cancellation of his stock (including his claim that reissuance of stock pursuant to the plan violated securities laws) are therefore barred by res judicata if this Court had jurisdiction to enter those orders.

This appears to be the key to Whitehorn's argument in this proceeding:

that this Court had no power to enter orders affecting Jack Whitehorn's property because his property was under the exclusive jurisdiction of the United States Bankruptcy Court for the District of Nevada and was protected by the automatic stay pursuant to 11 U.S.C. §362 when he filed his own Chapter 11 case in that district. Assuming that WFDR property had its bankruptcy case before this court[2] and even if it was undisputed from the beginning that Jack Whitehorn was the sole shareholder of WFDR, this Court entered no Orders and the defendants took no action which would require that the stay be lifted in Whitehorn's individual case in Nevada.

As a shareholder, Jack Whitehorn had certain rights in the corporation's bankruptcy case, including the right to receive a distribution of the residual value of the corporation after all claims

against the company were satisfied. The cancellation of the existing WFDR stock did not affect such right because Jack Whitehorn received in its place certificates of interest in the proceeds of the sale of WFDR, and a distribution of such proceeds was in fact made on Jack Whitehorn's behalf to his attorneys. it is true, as Whitehorn argues, that the question of ownership of stock was ultimately decided in Jack Whitehorn's favor. Jack Whitehorn benefited from his ownership interest when his attorneys were paid from the proceeds of the sale of the newly issued stock of WFDR. His ownership entitled him to such a distribution, but his own bankruptcy filing did not give him any greater rights to challenge the sale than he already possessed as a party-in-interest in WFDR's case. It thus appears that the orders in the WFDR case did not affect

Jack Whitehorn's property rights but only affected the pieces of paper representing such rights -- i.e. the stock certificates which were cancelled and replaced by certificates of interest in the sale of the proceeds.

Whitehorn's own bankruptcy could not stay the ministerial act of cancellation of shares by the corporate debtor-in-possession any more than any indvidual shareholder's bankruptcy could stay the fluctuation of the market prices of such individual's shares. Although the automatic stay protects a debtor from certain acts against his property, it does not enhance his rights held pursuant to contracts, leases, or stock certificates. In short, this court had jurisdiction as a result of WFDR's filing to issue Orders approving the sale of assets or the cancellation of stock even if an individual stockholder's own

bankruptcy case was pending in another jurisdiction.[3] Therefore, Whitehorn's claims are barred as res judicata.

Furthermore, following the approved sale of assets or cancellation of stock, the actual WFDR certificates were of inconsequential value and are therefore not subject to turnover under 11 U.S.C. §542.

Finally, the Court notes that the defendants have filed a motion to amend their answer to assert the affirmative defense of the statute of limitations to the extent that the complaint seeks to avoid a post-petition transfer pursuant to 11 U.S.C. §549. The plaintiffs have responded that they do not oppose the amendment but deny that the statute of limitation is applicable because their complaint does not raise §549. The Court will therefore grant the motion to amend, but holds, as a further ground for

granting defendants' summary judgment motion, that the clear language of 11 U.S.C. §549(d)(1) would bar Whitehorn's action to any extent that it does seek to avoid a post-petition transfer, because the action was not commenced within two years of the transaction sought to be avoided.

Accordingly, it is ORDERED:

(1) that the defendants' motion for leave to amend answer is GRANTED:

(2) that the plaintiffs' motion for summary judgment is DENIED; and

(3) that the defendants' motion for summary judgment is GRANTED, and this proceeding is therefore DISMISSED.

At Newnan, Georgia, this 31 day of July, 1987.

W. H. Drake, Jr.

United States Bankruptcy Judge

FOOTNOTES

1 To any extent that Jack Whitehorn is now asserting that the Order finding a preferential transfer shows that WFDR had no right to file its Chapter 11 case without his authorization, this assertion would be beyond the holding of that Order. Finding the stock option agreement to be a preference does not mean that the Court found the agreement was void from its inception, or that the transfer, in effect, never took place. Rather, the Order finding a preference holds that the transfer of stock ownership which did occur is voidable and could therefore be reversed by Jack Whitehorn. This Court has never found the transfer to be void and has, in fact, in the March 16, 1981 Order approving the sale of assets, explicitly rejected

Whitehorn's assertion that the management elected through the exercise of the proxy contained in the stock option agreement lacked the authority to commence WFDR's Chapter 11 case.

2 Any claim to the contrary would be barred by res judicata since this Court rejected Whitehorn's claim that the management which authorized the filing of the petition lacked the power to do so.

3 Statutory authority for this conclusion can be found at 11 U.S.C. §1141(d)(1)(B) which provides that a confirmed plan terminates all rights and interests of equity security holders provided for by the plan, unless the plan states otherwise.

Appendix 7

Transcript of Motion for

Change of Venue

Adversary Proceeding No. 860045

from Commencement Court

United States Bankruptcy Court

District of Nevada to

United States Bankruptcy Court

Northern District of Georgia

Newnan Division

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

Adversary Proceeding No. 860045

TRANSCRIPT OF MOTION

BEFORE THE HONORABLE ROBERT CLIVE JONES

THE COURT: All right. The matter is submitted.

First as to jurisdiction, I don't see any issue on jurisdiction. This is an issue for change of venue. there is nationwide service and personal jurisdiction under the Statute and under the Rules over the current parties. The issue really is convenience, however.

While this Court has some reservation about the sale of the stock without lifting the stay -- and I do have those reservations -- this Court would have undoubtedly lifted the stay if it had been asked so that a complete proceeding could resolve not only assets but stock of a corporation which holds a

broadcasting license.

But while I have real reservations about disposition of that stock without first asking for lifting of stay in this estate, if that Court or upon appeals any higher Court made mistakes or errors, I think in all fairness it's up to that Court to correct it. It's not fair to collaterally attack the result of those orders here. I have to have as much faith in the selection process and the appointment of Judges in Georgia as I do in the ones in Nevada. Having that faith justice will either be done there or Appellate Courts will appropriately rule.

But looking simply to the issue of convenience and the parties involved and who the parties likely are to be involved, witnesses and the fact that substantial prior proceedings relating to the assets, if not assets and stock, certainly arguments relating to assets

and stock have been heard by that Court. It makes every sense to me to transfer just the adversary and the adversary alone there.

I'm not lifting the stay, of course, with respect to any of Mr. Whitehorn's assets. That has to be -- I'm not lifting the stay. I'm just simply transferring venue of the case, the adversary proceeding.

But on that basis, the Rules applicable to change of venue, I have to grant the motion. So, that will be the order of the adversary only.

MS. RIEGLE: Thank you. I'll prepare the order and send a copy to Mr. Whitehorn.

C E R T I F I C A T I O N

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

BY: SHEILA KLIWINSKI

J & J COURT TRANSCRIBERS

DATE: August 13, 1986

Appendix 8

Transcript and Order of Judge Jones'
Ruling on Show Cause Hearing
Pertaining to Wording in Order to
Transfer Venue of
Adversary Proceeding No. 860045
Entered December 17, 1986

Certificate That No Proceeding
to Lift Stay Has Been Filed
Entered December 2, 1986

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

LAS VEGAS, NEVADA

Case No. BK-S-80-00936

Adv No. ADV-S860045

Portion of Hearing/Judge's Ruling

Motion to Show Cause

Before the Honorable Robert Clive Jones,

Bankruptcy Judge

Transcript ordered by: Jack Whitehorn

PROCEEDINGS IN PROGRESS

THE COURT: Well, what I meant, of course, on page 3 is that I'm not lifting the stay to allow you to take any counterclaims with respect to any of his assets or to ask for -- for example, sanctions. You'd have to ask this Court for relief.

MS. RIEGLE: Yeah, but I -- I don't disagree, but there was no such motion on, and I'm just concerned if we start putting surplusage into a motion/

THE COURT: Well, I don't/

MS. RIEGLE: /to transfer venue.

THE COURT: /I don't like Mr. Whitehorn's language, but I -- I agree that there should be an additional statement. And it should be -- it is further ordered that this Court is not lifting the stay, with respect to any of Mr. Whitehorn's assets, period.

MS. RIEGLE: But there was no motion on.

THE COURT: I'm not ruling on, whether or not -- and I don't want any language in the order on, whether or not, I lifted the stay or Judge George lifted the stay previously. That's -- the record will disclose that or not disclose that and I'm not ruling on that in here.

But I do want it clear that I'm not lifting the stay presently, with respect to Mr. Whitehorn. I can certainly see why the Court would feel at Liberty -- I

would feel at liberty to take the entire thing with respect to Mr. Whitehorn and allow -- allow amendments to the answer, for example, to allege damages against him and that may well be appropriate. It may well be that sanctions are appropriate, but I want the stay lifted here first, before you can do that.

So that's why I think it is appropriate to tell that Court in all fairness, that I'm not lifting the stay/

MS. RIEGLE: Okay.

THE COURT: /that you do need to come back for that.

MS. RIEGLE: I have no problem, except there was no motion on, and I think it just -- when you add surplusage like that.

THE COURT: All right, let's amend the order and put the additional sentence: "It is further ordered that this Court is not lifting the stay with

respect to many --- of any of Mr. Whitehorn's assets, period."

MS. RIEGLE: Let's add, and I apologize, I don't want anybody, you know, -- if we have another Judge tomorrow, I don't want somebody to think that I've raised a motion and you denied my motion.

THE COURT: Raised what motion?

MS. RIEGLE: The order. If it read that way, a Judge will come into tomorrow, if I move to lift stay, let's assume to seek damages, quite frankly, I've thought about it. And they say you denied it.

THE COURT: But you can say, is not presently lifting.

MS. RIEGLE: Okay, but there was no motion to rule on. Do you see my problem? If a Judge comes in tomorrow, some --- heaven forbid something happens to Your Honor, we have an order that

says, you haven't/

THE COURT: I could happen, there's some threat out there. (laughter)

MS. RIEGLE: Of course, you might drown in the rain out there.

THE COURT: So -- and so how would there be any/

MS. RIEGLE: The Court would come in and say, this Court has ruled that I'm not going to lift the stay.

THE COURT: No.

MS. RIEGLE: Then I'd have to lift the stay and it's without prejudice.

THE COURT: I don't think so. Let's put it in there, "That this Court is not presently lifting the stay, with respect to any of Mr. Whitehorn's assets."

MR. WHITEHORN: Thank you, Your Honor.

THE COURT: That's without prejudice to any further motion to lift the stay.

MS. RIEGLE: Then I don't say, I'm

without prejudice to a motion to lift stay. Let's make that expressed.

THE COURT: I -- let's make it this way, "It is further ordered that this Court is not presently lifting the stay, with respect to any of Mr. Whitehorn's assets, period."

MR. WHITEHORN: Thank you, again, Your Honor.

MS. RIEGLE: But again, I'm sorry, without prejudice to the bringing of such a motion.

THE COURT: No, I think that's sufficient, to state it. --- It is further ordered that this Court is not presently lifting the stay with respect to any of Mr. Whitehorn's assets. Okay?

MR. WHITEHORN: Ms. Riegle will prepare the order, please -- submit it?

MS. RIEGLE: Yeah,I/

MR. WHITEHORN: Thank you, very much.

MS. RIEGLE: /I'm just confused the Court is going to get confused there about, whether or not we can defend even -- the turnover.

THE COURT: Here, I'll make it clear on the record/

MS. RIEGLE: Without seeking/

THE COURT: /you're at liberty to defend the turnover.

MS. RIEGLE: To defend. Yeah.

THE COURT: You're -- the venue of that case was transferred there.

MR. WHITEHORN: Thank you, again, sir.

THE COURT: This is your transcript, Ms. Riegle.

MS. RIEGLE: Oh, I'm sorry.

THE COURT: Thank you.

PROCEEDINGS CONCLUDED

CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF

PROCEEDINGS IN THE ABOVE - ENTITLED MATTER.

NORTHWEST TRANSCRIPTION SERVICE
P. O. BOX 890
NAMPA, IDAHO 83653
(208) 466-2743

Gayle M. Lutz

SIGNATURE OF COURT REPORTER/TRANSCRIBER

11/25/86

DATE

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

LAS VEGAS, NEVADA

Case No. BK-S-80-00936

Adv No. ADV-S860045

AMENDED ORDER

Entered December 17, 1986

The motion of defendants Margaret H. Murphy and the law firm of Smith, Gambrell and Russell (collectively referred to as "Murphy") having come on regularly for hearing on June 24, 1986, defendants appearing by and through their attorney Linda Riegle of Lionel Sawyer & Collins, plaintiffs/debtors appearing in proper person through Jack Whitehorn, this Court having read and considered the papers and pleadings on file herein, having heard and considered the arguments presented and having found that the interest of justice and the convenience of the parties would best be served by a

change of venue;

IT IS HEREBY ORDERED that the motion of defendants to transfer the venue of adversary proceeding No. 86-0045 filed in BK-S-80-936 is granted; and

IT IS FURTHER ORDERED that such proceedings be transferred to the Northern District of Georgia, Newnan Division and that all pleadings and papers on file in such proceedings be transferred to that district; and

IT IS FURTHER ORDERED that this Court is not presently lifting the stay with respect to any of Mr. Whitehorn's assets; and

IT IS FURTHER ORDERED that the May 9, 1986 order of this Court setting, among other things, trial of the adversary proceeding set for December 10, 1986 at 9:00 a.m. is hereby vacated.

DATED this 16 day of December, 1986.

Robert Clive Jones/BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

LAS VEGAS, NEVADA

Case No. BK-S-80-00936

Adv No. ADV-S860045

C E R T I F I C A T E

This is to certify that relief was ordered and entered in the above styled case, October 6, 1980, pursuant to Debtors' petition, attached hereto and incorporated herein.

This is to further certify that as of this date, no proceeding has been filed or entered in the above styled case for the lifting of automatic stay on WFDR, Inc. stock shown in Debtors' Statement of Affairs as set forth in Schedule B-2(T) and B-3, attached hereto and incorporated herein.

This 2nd day of December, 1986

Patricia Gray-Edwards, Clerk

Schedule B-2(T)

Whitehorn Co., Inc. (Ga. Corp.) 100% stock (insolvent)* -0-

- See schedule B-3

Vegas Unlimited Inc. (Nevada Corp.) 500.00

WFDR, Inc. (Ga. Corp.) 100% Stock. Presently in litigation over ownership - See Schedule B-3*. 1,500,000.00

Schedule B-3

<u>WFDR, Inc. Stock and Whitehorn Company stock and debts</u>:

There is litigation currently pending in Atlanta, Georgia and Dallas, Texas over the ownership of the WFDR, Inc. stock. Debtor Jack Whitehorn acquired same approximately ten years ago. WFDR, Inc. owns two radio stations in Manchester, Georgia. At issue is a purported "Stock Option Agreement" dated March 28, 1980 between Debtor Jack Whitehorn and Debtor Jack Whitehorn's

brother, John Whitehorn of Dallas, Texas and the purported exercise of an option by John Whitehorn to acquire the WFDR, Inc. stock on May 22, 1980. John Whitehorn caused WFDR, Inc. to file a Chapter XI proceeding in the Northern District of Georgia, Newnan Division, on May 9, 1980. Jack Whitehorn has challenged the validity of this Agreement and action before the Federal Communications Commission and has initiated an adversarial proceeding in the Georgia Chapter XI proceeding. John Whitehorn has brought an action in Dallas, Texas, Debtor Jack Whitehorn states that he believed the document he signed was to create a trust for the benefit of him and his family. Under the purported Stock Option Agreement he states he would receive no payment for his stock and that he has received no payment for same. He is challenging the validity of the

Agreement and the exercise of the option on a number of grounds. A qualified broker has valued the FM station assets and license alone at $1.5 million. Debtor Jack Whitehorn states that he believes that a conservative estimate for the value of both stations would be $1.5 million ($2 million for the stations less approximately $500,000.00 in liabilities). UNKNOWN

Debtor believes that this transaction relating to the Stock Option Agreement is also voidable as a preference to an insider.

Because of the above litigation and records which are not in the Debtor's possession or control, all reference to debts and values involving an interrelationship among Debtor, Whitehorn Company and WFDR, Inc. are approximate and are subject to further determination and the results of the pending litigation as are

claims by Doctor Jack Whitehorn against John Whitehorn and the management installed by John Whitehorn. 11 U.S.C. §522(d)

Appendix 9

Order Setting Out

That All Provisions of

Title 11 United States Bankruptcy Code

Are Restored Nunc Pro Tunc

October 6, 1980 to Petitioners/Debtors

Entered May 31, 1988

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

Case No. BK-S-80-936RCJ

Entered May 31, 1988

ORDER

The motion of Debtors-in-Possession, Jack R. Whitehorn and Mary Ruth Whitehorn, for action to vacate the order of dismissal of above said case entered October 7, 1987, having come on regularly for hearing on May 10, 1988, Objectors, Cherry Lane Music Company et al, Margaret H. Murphy and Law Firm, Smith, Gambrell & Russell, appearing by and through their attorney Carol White of Lionel Sawyer & Collins, Movants/Debtors-in-Possession appearing in proper person through Jack Whitehorn, this Court having read and considered the papers and pleadings on file herein, having heard and considered the arguments presented and having found that the Movants/Debtors-in-Possession

were not properly notified of the show cause hearing pursuant to the Movants/Debtors-in-Possession's mailing address on file at time of said notice as set out in the Court Clerk's official calendar.

IT IS HEREBY ORDERED that the motion of Debtors-in-Possession, Jack R. Whitehorn and Mary Ruth Whitehorn to vacate the order of this court entered October 7, 1987, is granted; and

IT IS FURTHER ORDERED that all provisions of Title 11 United States Bankruptcy Code is restored nunc pro tunc the commencement date of October 6, 1980, to said Debtors.

DATED this 31st day of May, 1988.

Robert Clive Jones

Appendix 10

United States Court of Appeals

for the Eleventh Circuit

Order Denying Motion of Appellants

for Enlargement of Time

for Stay of Mandate

Entered October 4, 1988

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CASE NO. 88-8018

Appeal from the United States

District Court for the

Northern District of Georgia

ORDER

IT IS ORDERED that the motion of appellants for a further stay of the issuance of the mandate is DENIED.

/s/ PHYLLIS A KRAVITCH

UNITED STATES CIRCUIT JUDGE

(3)

Supreme Court, U.S.
FILED
NOV 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 88-647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN RE:

JACK R. WHITEHORN and
MARY RUTH WHITEHORN,

Debtors,

JACK R. WHITEHORN and
MARY RUTH WHITEHORN,

Petitioners,

vs.

MARGARET H. MURPHY and
SMITH, GAMBRELL & RUSSELL,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

KENNETH L. MILLWOOD
Counsel of Record for
Respondents
SMITH, GAMBRELL & RUSSELL
2400 First Atlanta Tower
Atlanta, Georgia 30383
(404) 656-1800
Attorneys for Respondents

22pp

QUESTIONS PRESENTED

1. Whether the United States District Court and the United States Court of Appeals appropriately affirmed the Bankruptcy Court's determination that the Petitioners' rights were previously determined by a final order of the United States Bankruptcy Court for the Northern District of Georgia and that the relief requested is consequently precluded by the doctrine of *res judicata.*

2. Whether cancellation of Petitioners' stock in exchange for certificates of interest was stayed by operation of 11 U.S.C. § 362 upon the filing of Petitioners' individual Chapter 11 petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Case No. 88-647

IN RE:

JACK R. WHITEHORN and
MARY RUTH WHITEHORN,

Debtors,

JACK R. WHITEHORN and
MARY RUTH WHITEHORN,

Petitioners,

vs.

MARGARET H. MURPHY and
SMITH, GAMBRELL & RUSSELL,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

DECISION BELOW

The May 26, 1988, decision of the United States Court of Appeals in case no. 88-8018 affirming the decision of the district court is unreported. The December 21, 1987 decision of the United States District Court for the Northern District of Georgia affirming the order of the bankruptcy court is unreported. The July 31, 1987 order of the United States Bankruptcy Court for the Northern District of Georgia in favor of Respondents is unreported.

STATUTORY PROVISIONS INVOLVED

This case involves 11 U.S.C. § 1141:

Effect of Confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan —

> (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h) or 502(i) of this title, whether or not —

(i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if —

(A) The plan provides for the liquidation of all or substantially all of the property of the estate;

(B) The debtor does not engage in business after consummation of the plan; and

(C) The debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

This case also involves 11 U.S.C. § 1109:

Right to be Heard

(a) The Securities and Exchange Commission may raise and may appear and be heard on any issue in a

case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case.

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

STATEMENT OF THE CASE

Jack R. Whitehorn and Mary Ruth Whitehorn (hereinafter collectively "Petitioners") filed a Complaint to Compel Turnover on April 3, 1986, in the United States Bankruptcy Court for the District of Nevada (hereinafter the "Complaint"). The Complaint demanded turnover of certain stock of WFDR, Inc. (hereinafter "WFDR") allegedly in the possession of Margaret H. Murphy, and the law firm of Smith, Cohen, Ringel, Kohler & Martin (now known as Smith, Gambrell & Russell) (hereinafter collectively the "Respondents")[1], as well as "all assets said stock owns," alleging that the stock and assets constituted property of Petitioners. On December 17, 1986, the United States Bankruptcy Court for the District of Nevada entered an order granting the Respondents' motion to transfer the Complaint to the Northern District of Georgia.

Both the Petitioners and the Respondents filed motions for summary judgment. The Honorable United States Bankruptcy Judge W. Homer Drake entered judgment in favor of Respondents on July 31, 1987, holding Petitioners' claims were barred by the doctrine of *res judicata*. Petitioners appealed the judgment. The United States District Court for

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[1] Respondents acted as counsel to WFDR in its bankruptcy case and related proceedings. Respondent Murphy assumed her duties as United States Bankruptcy Judge for the Northern District of Georgia on October 19, 1987.

the Northern District of Georgia, Judge G. Ernest Tidwell, affirmed the bankruptcy court's decision on December 21, 1987.[2]

Petitioners thereafter perfected an appeal to the United States Court of Appeals for the Eleventh Circuit. The court of appeals affirmed the district court's order. The court of appeals also concluded that the appeal was "frivolous," and awarded double costs against Petitioners. Rehearing in banc was denied.[3]

The facts preceding the filing of the Complaint are not in dispute, the bankruptcy court having resolved these matters on cross-motions for summary judgment.[4]

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[2] The Complaint was originally mischaracterized as a turnover action under 11 U.S.C. § 542. If an action at all, the Complaint is an action under 11 U.S.C. § 549. *See Blanton* v. *Graham*, 35 Bankr. 15, 17 (Bankr. D.S.C. 1983); *Administrator of Veterans Affairs* v. *Bernard*, 21 Bankr. 287, 289 (Bankr. E.D.Pa. 1982); *Russell* v. *Equibank*, 8 Bankr. 342 (Bankr. W.D.Pa. 1980). Although Petitioners' prayer for relief seeks "turnover," the appropriate standard for determining the nature of an action is the underlying premise of the action, not the relief sought by the prayer. Although the remedy Petitioners seek is "turnover," from the standpoint of the Bankruptcy Code, Petitioners are seeking to avoid a transfer that occurred subsequent to the filing of their Chapter 11 petition, allegedly in violation of the automatic stay. The Complaint, however, is time barred because the action was not commenced within two years of the alleged voidable transfer. 11 U.S.C. § 549(d)(1). The cancellation of Petitioners' stock, the transfer sought to be avoided, occurred upon confirmation of the Amended Plan on or about June 29, 1981. The effective date of the Amended Plan was August 18, 1981, four and one-half years prior to the filing of the Complaint. Summary judgment was therefore properly granted in favor of the Respondents. *See Franke* v. *S.M.R.S., Inc. (In re Burstein-Applebee Company)*, 30 Bankr. 779, 780 (Bankr. W.D. Mo. 1983). The district court did not address the statute of limitations issue because of the favorable ruling on *res judicata*.

[3] While the suggestion of rehearing in banc was pending, Petitioners filed another action against Respondents in the United States District Court, District of Nevada, Civil Action File No. CV-S-88-541 (RJJ).

[4] The following account is based on the bankruptcy court's July 31, 1987, order. (Petitioners' Appendix at 60).

On March 28, 1980, Petitioner Jack Whitehorn executed a certain Stock Option Agreement in favor of his brother, Dr. John Whitehorn (hereinafter the "Stock Option Agreement"). The Stock Option Agreement included a proxy granting voting authority over Petitioners' 100% stock interest in WFDR, and an option to acquire Petitioners' stock in WFDR.

On May 9, 1980, WFDR filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code, case no. 80-00136N, in the United States Bankruptcy Court for the Northern District of Georgia. After unsuccessfully challenging various aspects of the WFDR Chapter 11 proceeding, Petitioners filed a voluntary individual petition under Chapter 11 in Nevada on October 6, 1980.

On July 22, 1980, in the Northern District of Georgia, and on December 11, 1980, in the District of Nevada, Petitioners initiated adversary proceedings against Dr. John Whitehorn contesting ownership of the stock and control of WFDR. On January 30, 1981, the Nevada court transferred the Nevada adversary proceeding to the Northern District of Georgia for consolidation.

On January 30, 1981, WFDR filed an application to liquidate its assets in the United States Bankruptcy Court for the Northern District of Georgia. Petitioners objected to the application both as alleged creditors of WFDR and claiming sole ownership of WFDR. Following notice and a hearing, the bankruptcy court entered an order on March 16, 1981, approving the sale of assets for $790,000.00 to Lake George Corporation, predecessor in interest to Provident Broadcasting Company (hereinafter "Provident"). On April 8, 1981, the bankruptcy court denied Petitioners' motions for a new trial, for alteration or amendment of the judgment, and for additional findings of fact. Petitioners appealed both orders (hereinafter collectively the "Orders Approving the Sale of Assets"), but did not seek a stay of the sale pending resolution of the appeal.

On May 27, 1981, WFDR filed an Amended Plan of Reorganization (hereinafter the "Amended Plan") which, upon confirmation, would implement the Orders Approving the Sale of Assets by cancelling the outstanding stock of WFDR. Holders of stock, including Petitioners, would receive certificates of interest evidencing entitlement to the net proceeds of the liquidation, after payment of debts and claims owing by WFDR.

Petitioners filed objections to the disclosure statement and to confirmation of the Amended Plan on the grounds, *inter alia*, that the management of WFDR lacked the requisite corporate authority to file the Chapter 11 petition. On June 29, 1981, the bankruptcy court entered an order confirming the Amended Plan over Petitioners' objections. In the order confirming the Amended Plan, the bankruptcy court acknowledged the pending adversary proceeding between Petitioners and John Whitehorn concerning the ownership of WFDR, but stated that even if "Jack Whitehorn is proven to be the owner of all the stock of WFDR, Inc., despite his objection to the plan of reorganization, the plan should be confirmed pursuant to 11 U.S.C. § 1129(b)(2)(C)." No appeal was filed from the order confirming the Amended Plan. The Amended Plan was thereafter fully consummated.

By order dated September 18, 1981, the United States District Court for the Northern District of Georgia dismissed Petitioners' appeal of the Orders Approving the Sale of Assets as moot "in that the amended plan providing for the sale of the stock in lieu of a sale of the assets has been approved and consummated." The district court also noted that the order approving the sale of stock had not been appealed and no stay of the sale had been obtained. On August 17, 1983, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's order dismissing Petitioners' appeal as moot because the order confirming the Amended Plan had not been appealed and because the sale authorized and implemented by the Amended Plan was not stayed.

On July 14, 1983, Respondents and the Committee of Unsecured Creditors of WFDR jointly filed an application to settle certain claims against the WFDR estate. The application provided, among other things, that upon partial payment of certain administrative and unsecured claims of Dr. John Whitehorn, Dr. John Whitehorn would relinquish any claim to proceeds of the shares of WFDR cancelled pursuant to the provisions of the Amended Plan. The application further provided that Petitioners' ownership interest in WFDR, evidenced by the newly issued certificates of interest tendered in exchange for the cancelled shares, was to be redeemed by the payment of $35,000 from the proceeds generated subsequent to the sale to Provident. On January 26, 1984, the bankruptcy court approved the settlement in recognition and satisfaction of Petitioners' interest in WFDR. Proceeds from the liquidation were paid to Petitioners' attorneys for the benefit of Petitioners' individual estate upon specific authorization by order of the United States Bankruptcy Court for the District of Nevada. On November 15, 1984, a final decree was entered closing the estate of WFDR.

SUMMARY OF THE ARGUMENT

The Amended Plan, having been confirmed and consummated, is *res judicata* as to all issues raised by Petitioners in the instant Petition, including the issue of whether cancellation of the stock was stayed by operation of law. That issue should have been raised at the confirmation hearing on the WFDR plan of reorganization, and cannot be used as a collateral attack on the Amended Plan.

The cancellation of stock held by an individual in Chapter 11 and substitution of certificates of interest by a corporation pursuant to the laws of the state of its incorporation and pursuant to an order of a United States Bankruptcy Court is not an action stayed by operation of 11 U.S.C. § 362. Petitioners' property rights were not altered by the cancellation and substitution. Only the form of the tangible evidence of Petitioners' equity interest was changed.

REASONS FOR DENYING THE WRIT

The Petition follows the determination by the Court of Appeals that the appeal to that court was frivolous. Consistent with that finding, Petitioners have failed to establish a reason for granting the Writ.

The decision below is consistent with decisions of other federal courts of appeals and the accepted and usual course of judicial proceedings. This case does not involve an important question of federal law which should be settled by this Court, and the decision below is in harmony with the applicable decisions of this Court. Moreover, the facts and procedural background of this case are so unique as to eliminate any significant precedential value of a review on the merits by this Court.

A. The courts below correctly applied settled law in holding the Complaint is barred by the doctrine of res judicata.

All of the relevant claims and issues raised by the Complaint were previously addressed (or would have been addressed if raised) by the bankruptcy court in the WFDR bankruptcy case through the confirmation of the Amended Plan. The effect of the automatic stay on the WFDR reorganization should have been litigated seven years ago, if at all. The defense, even if meritorious, is now barred and superceded by the confirmation and consummation of the Amended Plan. Although Petitioners, who at the time were represented by counsel, objected to confirmation of the Amended Plan, they failed to raise the issue of the automatic stay. Moreover, Petitioners did not appeal the confirmation order.

Confirmed plans of reorganization have a binding *res judicata* effect on all parties.

> [T]he provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and

> any creditor, *equity security holder*, or general partner in the debtor whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

11 U.S.C. § 1141(a) (emphasis added). All issues raised and all issues that could have been plead in objection to confirmation of the Amended Plan are *res judicata* and cannot now be asserted as a collateral attack on the Amended Plan. *See Southmark Properties* v. *Charles House Corporation*, 742 F.2d 862 (5th Cir. 1984). *See also* 5 Collier on Bankruptcy ¶ 1141.01[1] (15th ed. 1987). *Res judicata* not only bars claims that actually were litigated in a previous proceeding, but reaches beyond the scope of collateral estoppel and bars litigation of claims that *could have been* litigated in the previous action. *Hotel Corp. of the South* v. *Rampart 920, Inc.*, 46 Bankr. 758, 767 (E.D. La. 1985), *aff'd*, 781 F.2d 901 (5th Cir. 1986). All of the issues raised by Petitioners, including the effect of the automatic stay, should have and could have been raised and litigated as objections to the Amended Plan.

The *Southmark Properties* decision is particularly apposite. In *Southmark Properties*, the United States Court of Appeals for the Fifth Circuit applied the doctrine of *res judicata* to a factual circumstance substantially similar to that of the instant proceeding and barred relitigation of all issues that could have been raised as objections to confirmation. In *Southmark Properties*, the president and majority shareholder of the debtor corporation objected to the plan of reorganization. The objections were overruled by the bankruptcy court, but were subsequently renewed, albeit in recharacterized form, in a collateral attack on the confirmation order. The Fifth Circuit Court of Appeals held that:

> We are equally convinced that the judgment of the district court ordering and confirming the sale and transfer of title of the property to Southmark are *res judicata* as to the claims asserted by appellants. The

test in this Circuit for determining whether a claim is barred by the doctrine of *res judicata* is as follows:

> "For a prior judgment to bar an action on the basis of *res judicata*, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases [citations omitted] . . . ."

> Although appellants assert that Craig was not a party to the reorganization proceedings, . . . Craig — as a stockholder of the debtor corporation — possessed a statutory right to be heard "on all matters arising in" the proceedings. [Citation omitted]. The record does show that Craig was actively involved in the reorganization proceedings. By participating in the proceedings, Craig became a party to them, regardless of whether he was formally named as such. [Citation omitted].
>
> Moreover, even if Craig were not a party to the reorganization proceedings, a final judgment is *res judicata* not only between parties to the earlier lawsuit, but also their privies. [Citation omitted]. Because Craig, as a major stockholder in appellant corporation, its president, and a guarantor on the construction loan, had a strong and direct pecuniary interest in the outcome of the reorganization proceedings, . . . he is bound by the reorganization orders. [Citation omitted].

742 F.2d at 869-70. The instant Petition is no less a veiled collateral attack on the confirmed Amended Plan of WFDR.

Contrary to Petitioners' assertion that *Southmark Properties* is distinguishable, Petitioners were a "party in interest" to the WFDR reorganization proceeding and are bound, as are all other such parties in interest, by the terms

and conditions of the Amended Plan. As an equity security holder in WFDR, Petitioners were a party in interest to the confirmation proceedings by definition under 11 U.S.C. § 1109.

Petitioners' participation in the proceeding and their pecuniary interest in the outcome further indicate their role as a party in interest. Similar to the objecting party in *Southmark Properties*, Petitioners took an active and aggressive role in contesting various stages of the reorganization process, including confirmation of the Amended Plan. Individually or through attorneys, Petitioners received notice of all proceedings, appeared at court hearings and filed numerous pleadings.

Petitioners should not be heard to complain at this date, seven years after confirmation of the Amended Plan, that their due process rights were in some unarticulated and inestimable fashion violated. Petitioners' mistaken assumption that the filing of the individual Chapter 11 proceeding automatically stayed consummation of the Amended Plan and made an appeal of the confirmation order unnecessary, is perhaps unfortunate, but such neglect or ignorance of legal rights and responsibilities, particularly when Petitioners were represented by competent counsel, does not serve to annul or abrogate the binding *res judicata* effect of the Amended Plan.

This Court in *Stoll* v. *Gottlieb* held that even a plan of reorganization which erroneously discharged certain personal guaranties was, nonetheless, *res judicata* and stated:

> Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there

> rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

305 U.S. 165, 172 (1938).

The decision below is entirely consistent with the decisions of this Court and is based on settled law. Indeed, other than an attempt to distinguish *Southmark Properties*, Petitioners have not cited any authority which is relevant to the *res judicata* issue.

B. Consummation of the Amended Plan did not violate the automatic stay imposed by the filing of Petitioners' Chapter 11 petition.

Petitioners' principal argument is that the bankruptcy court had no jurisdiction to enter orders affecting Petitioners' stock, including the order confirming the Amended Plan, because the stock was under the exclusive jurisdiction of the United States Bankruptcy Court for the District of Nevada and was protected by the automatic stay pursuant to 11 U.S.C. § 362. The theme running through Petitioners' argument is that the automatic stay imposed by the Chapter 11 proceeding completely prohibited cancellation of the stock and thereby precluded consummation of the Amended Plan.

Petitioners continue to rely on an incorrect, overliteral interpretation of the legal effect of the automatic stay of 11 U.S.C. § 362. Petitioners' protestations to the contrary notwithstanding, the automatic stay imposed by the filing of Petitioners' Chapter 11 proceeding in the United States Bankruptcy Court for the District of Nevada stayed only certain direct acts against Petitioners' property, including several foreclosure proceedings then pending against Petitioners. The automatic stay is not so all-encompassing or unlimited as to apply to every conceivable act, no matter how tangenital the effect on property of a debtor. *See Avelline & Bienes* v. *M. Frenville Co. Inc.*, 744 F.2d 332, 334 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *In re Continental Airlines, Inc.*, 61 B.R. 758, 776 (S.D. Tex. 1986).

As a shareholder, Petitioners had certain rights in WFDR, including the right to receive a distribution of the residual value of WFDR after all claims and debts were satisfied. The cancellation of the stock pursuant to the confirmed Amended Plan did not impair or abrogate those rights because Petitioners received certificates of interest evidencing entitlement to the net proceeds generated from consummation of the Amended Plan. A distribution of such proceeds was made in Petitioners' favor to their attorneys with the knowledge, acquiescence, and express consent of the United States Bankruptcy Court for the District of Nevada. Petitioners directly benefitted when their attorneys were paid from the proceeds of the newly issued stock of WFDR.

Cancellation of stock, whether by plan or reorganization, merger, stock purchase agreement, or otherwise, is not an act that falls within the proscriptions of 11 U.S.C. § 362. A stock certificate is nothing more than a piece of paper evidencing an interest in the equity of the corporation. By virtue of the stock certificates, Petitioners' owned a bundle of rights to a distribution of the residual value of WFDR only after all claims against WFDR were satisfied. *Evans* v. *Stockton & Hing (In re Southwest Restaurant Systems)*, 607 F.2d 1243 (9th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980). The certificates of interest gave Petitioners exactly the same bundle of rights. Petitioners' property rights were not altered by the mere change in the physical piece of paper representing those rights. Petitioners held the same bundle of rights pre-petition, the same bundle of rights prior to confirmation of the Amended Plan, and the same bundle of rights subsequent to confirmation and consummation of the Amended Plan.

Corporations acting within the scope of their charters and state law should not be obligated to seek relief from the stay to perform ministerial functions such as stock cancellation, stock splits, declaration of dividends or other corporate acts that may affect price or equity shares. Respondents have located no case or statutory authority evidencing such a responsibility. Cancellation of shares by a debtor corporation

and reissuance of new shares of the reorganized company in exchange for new consideration are among the most common forms of corporate reorganization. *See, e.g., Southwest Restaurant Systems* v. *Grace*, 607 F.2d 1248 (9th Cir. 1979); *In re Evans Products Co.*, 65 Bankr. 870 (S.D. Fla. 1986); *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 68 Bankr. 95 (M.D.N.C. 1986), *appeal dismissed*, 841 F.2d 92 (4th Cir. 1988); *In re Compass Van & Storage Corp.*, 68 Bankr. 1007 (Bankr. E.D.N.Y. 1986); *Beverages International, Ltd.* v. *Schenley Affiliated Brands Corp.*, 61 Bankr. 966 (Bankr. D. Mass. 1986); *In re Rath Packing Co.*, 55 Bankr. 528 (Bankr. N.D. Iowa 1985); *In re Toy & Sports Warehouse*, 37 Bankr. 141 (Bankr. S.D.N.Y. 1984); *In re Blanton Smith Corp.*, 37 Bankr. 300 (Bankr. M.D. Tenn. 1983); *In re Tamarack Trail Co.*, 25 Bankr. 259 (Bankr. S.D. Ohio 1982).

The issuance of the certificates of interest constituted merely a transformation or substitution of the tangible evidence of Petitioners' interest in WFDR, not an interference with or act to gain possession of any of Petitioners' property. Accordingly, cancellation and replacement of the stock certificates with the certificates of interest, pursuant to the provisions of the confirmed Amended Plan, did not violate the stay imposed by 11 U.S.C. § 362 in the Petitioners' individual Chapter 11 proceeding.[5]

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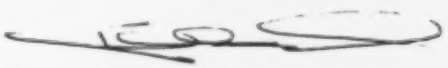
[5] The arguments contained at pages 45-47 of the Petition do not warrant response.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served the requisite number of copies of the foregoing Brief in Opposition on Jack R. Whitehorn and Mary Ruth Whitehorn, Petitioners, 5141 Indian River Drive, Box 377, Las Vegas, Nevada, 89103 by placing same in the United States Mail, first class postage prepaid, this 15 day of November, 1988. I further certify that all parties required to be served have been served.

Kenneth L. Millwood